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13 STATE OF CALIFORNIA
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15 STATE WATER RESOURCES CONTROL BOARD
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13 In the Matter of the Petition for Review by The
14 Boeing Company Of Waste Discharge
15 Requirements Orders Nos. R4-2004-011, R4-
16 2006-0008, and R4-2006-0038

No.: OCC A-1653 and A-1737

**MEMORANDUM OF POINTS AND
AUTHORITIES IN OPPOSITION TO THE
BOEING COMPANY'S APPEALS OF
ORDERS NOS. R4-2004-011, R4-2006-0008,
AND R4-2006-0038**

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For decades, nuclear operations, rocket testing, and hazardous waste disposal at Boeing's Santa Susana Field Laboratory have contaminated soil, groundwater, and surface water with a host of toxic substances, including dioxin, heavy metals, radioactive substances, perchlorate, solvents, and PCBs. The site has been undergoing studies for remediation for years, but, apart from some interim removal actions, substantial site cleanup has not commenced.

Meanwhile, Boeing has discharged toxic substances from its mountain-top facility into the headwaters of the Los Angeles River and Arroyo Simi – streams that flow directly through heavily populated areas directly below the facility. The effect of these discharges has been to contaminate local properties and drinking water supplies, and to expose Boeing to millions of dollars of liability to local residents.

However, despite this, and despite the Regional Board's efforts to control Boeing by imposing numeric effluent limitations in its NPDES permits, Boeing has taken no effective measures to prevent off-site migration of its pollutants. In fact, Boeing has regularly violated the numeric limits in its NPDES permits since at least 1998.

Faced with the prospect of enforcement action, Boeing's response has not been to address the problem on the ground. Instead, Boeing has challenged the Regional Board's authority to impose numeric limits at all, its determination that limits were necessary for Boeing's facility, its derivation of those limits, and its refusal to waive the limits simply because Boeing has not taken the necessary steps to control its discharges.

In fact, numeric water quality-based effluent limits are clearly authorized for Boeing's individual storm water permit under the Clean Water Act, and water quality-based effluent limitations are mandatory when necessary to meet water quality standards. Boeing's arguments to the contrary are

1 based on misapplying the exception for storm water permits where data is not available to determine
2 limits – as in storm water general permits – an exception that was inapplicable here because the
3 Regional Board had ample site-specific effluent monitoring data. Boeing also resolutely misinterprets a
4 footnote in the State Implementation Policy (SIP) for toxics that stands for nothing more than the
5 proposition that numeric limitations are not *required* for storm water general permits, *e.g.*, where site-
6 specific effluent data are not available. The SIP did not relieve Boeing of the obligation to comply with
7 the California Toxics Rule.
8

9 The Regional Board properly determined that Boeing’s numeric limits were necessary to meet the
10 water quality standards and to protect beneficial uses of the receiving waters. The Regional Board
11 evaluated extensive effluent monitoring data, which indicated that discharges had the reasonable
12 potential to cause or contribute to exceedances of water quality standards. The numeric limits
13 themselves were properly determined in accordance with relevant guidance documents. Issues raised by
14 Boeing’s consultant at the eleventh hour regarding background water quality, variability, and proper
15 models are red herrings, in part because site discharges and the beneficial uses of the waters from the
16 site are intermittent and the limitations were properly set without reference to dilution. And Boeing fails
17 entirely to show that these issues would actually have made any difference to the limits derived.
18

19 The Regional Board properly refused to grant Boeing a compliance schedule. Boeing has long
20 known that it needed to make greater efforts to comply: it has been reporting violations of numeric
21 effluent limits since 1998 and has known since at least 2002 that stricter limits would be imposed.
22 Compliance with those limits is feasible through the use of available technology for erosion control,
23 treatment, and source control. Despite this, Boeing has not taken the steps to implement this technology
24 timely, instead persisting in its indefensible position that its compliance obligation is merely to
25 implement a program of best management practices.
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1 Boeing was not entitled to a compliance schedule in its permit, or to a time schedule order under a
2 cease and desist order, because it has not demonstrated that compliance is infeasible. Boeing has not
3 explained why it did not act in 1998 or 2002 to implement effective compliance measures when it knew
4 they were necessary. Given these years of delay, Boeing's proposal for five more years of study is
5 simply unwarranted and inequitable. Furthermore, Boeing did not ask for a compliance schedule when
6 its permit was reissued in 2004, and any authority to grant a compliance schedule for toxic constituents
7 expired in 2005.

9 Boeing's claim that pollutants from other sources contribute to permit violations is a cynical effort to
10 distract attention from the overwhelming evidence that violations are due to decades of industrial
11 activity that has contaminated the site. The claim is not supported by the last minute study put together
12 by Boeing's consultant. And even if pollutants from other sources did contribute to effluent loading,
13 Boeing's claim is irrelevant. As a practical matter, the same erosion control and treatment technology
14 that Boeing must implement to control its industrial pollution would address other pollution sources too.
15 And Boeing is legally responsible to control discharges of other sources of pollution in any event – just
16 like other storm water dischargers.

19 If ever there were a site that warranted numeric limitations, it is this site – due to the unique extent
20 and toxicity of contamination, the critical headwaters location, the availability of data, and the long
21 history of noncompliance. If the State Board finds numeric limits inappropriate for this site, it will
22 effectively be making a policy decision for all sites. Boeing should not be rewarded for defying the
23 Regional Board and failing to meet its clear legal obligation under the Clean Water Act to control its
24 pollutants.

1 **II. FACTUAL AND PROCEDURAL BACKGROUND**

2 **Site Background**

3 Boeing's Santa Susana Field Laboratory ("SSFL") is located on a 2,850-acre site in Ventura County,
4 and discharges storm water and industrial wastewater into Bell Creek, Dayton Canyon Creek, the Los
5 Angeles River, Arroyo Simi, and Calleguas Creek. LARWQCB, Order No. R4-2006-0008, Amending
6 Order No. R4-2004-0111, adopted Jan. 19, 2006 ("January 2006 WDRs"), pp. 1-8, 14-16. The
7 discharges constitute the headwaters for Bell Creek and Dayton Canyon Creek and represent a
8 significant portion of the headwaters for the Arroyo Simi. *Id.*, pp. 23, 25, Figs. 1, 2. Most of the area
9 around the SSFL facility is undeveloped, so the Facility represents the only significant source of
10 industrial contamination to waters in its immediate vicinity. *Id.*, pp. 22, 23.

13 Beneficial uses of Dayton Canyon Creek, Bell Creek, and Arroyo Simi include wildlife habitat,
14 including rare, threatened, and endangered species habitat, industrial process supply, groundwater
15 recharge, recreation, and warm freshwater habitat. *Id.*, pp. 14-15, 23. Receiving waters are already
16 impaired for coliform, volatiles, oil, ammonia, nutrients, metals, chloride, boron, sulfates, TDS, toxicity,
17 various pesticides, and siltation – many of which are parameters for which Boeing seeks to vacate
18 effluent limitations. *Id.*, pp. 21-25.

20 The SSFL facility has been or is being used for research, development, assembly, disassembly, and
21 testing of rocket engines, missile components, and chemical lasers and for operations involving nuclear
22 fuels and reactors. LARWQCB, Order No. R4-2004-0111, July 2004, Fact Sheet ("July 2004 Fact
23 Sheet"), pp. 3-5; LARWQCB, Order No. R4-2004-0111, July 2004 ("July 2004 WDRs"), pp. 1-6.

25 Soil and groundwater at the site are heavily contaminated by past operations. January 2006 WDRs,
26 pp. 9-13. The facility was established in the 1940s as a remote field laboratory for activities that were
27 too dangerous to perform in more populated areas, but since that time the area surrounding the site has
28

1 become highly populated. LARWQCB, Reporters Transcript of Proceedings, 473rd Regular Board
2 Meeting, May 6, 2004 (“May 6, 2004 Transcript”), p. 82. Upwards of 30,000 rocket tests have occurred
3 at the site, which continue to this day. LARWQCB, Reporters Transcript of Proceedings, 475th Regular
4 Board Meeting, July 1, 2004, (“July 1, 2004 Transcript”), pp. 85-86; *see also* LARWQCB, Transcript of
5 January 19, 2006 hearing (“January 19, 2006 Transcript”), pp. 89-91. The site housed approximately 10
6 nuclear reactors, a plutonium fuel fabrication facility, and a large laboratory for cutting up irradiated
7 nuclear fuel. May 6, 2004 Transcript, p. 83. This “hot lab” suffered a number of fires and radioactive
8 leaks. *Id.* One of the reactors suffered a partial meltdown in 1959. July 1, 2004 Transcript, pp. 83-86.
9 In 1964 a second reactor accident resulted in damage to 80% of its fuel; and in 1968 a third reactor
10 suffered similar damage. *Id.*, p. 86.

13 For decades, reactor components contaminated with sodium were burned in the open air in open
14 water-filled pits; the water then drained down the ravine. May 6, 2004 Transcript, pp. 82-83. No
15 radioactive or chemically toxic materials were supposed to have been burned in the pits, but they were
16 nonetheless, so the burn pit became heavily contaminated, as did groundwater beneath the pit. *Id.*
17 Surface runoff took the contaminants onto the property of a nearby camp, where that offsite
18 contamination resulted in litigation and purchase by Boeing of the land it had contaminated. *Id.*

20 The site contained a very intensively used nuclear facility, run for the Atomic Energy Commission
21 (now Department of Energy). May 6, 2004 Transcript, pp. 83, 89. In 1989, a study performed for DOE
22 found widespread chemical and radioactive contamination throughout the site – in soil, surface and
23 groundwater. Dan Hirsch, Committee to Bridge the Gap, letter to Dennis Dickerson, LARWQCB, Oct.
24 20, 2003, p.1. Chemical contaminants ranged from dioxins and PCBS, to heavy metals, to a host of
25 volatile and semi-volatile organic compounds. Radioactive contaminants include cesium-137,
26 strontium-90, plutonium-238 and –239, and tritium. *Id.* Subsequent studies found contaminants had
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1 migrated off the property, contaminating a nearby camp, state park, and other offsite land. *Id.* DOE
2 disclosed that tritium had been found contaminating the groundwater at SSFL, four times the safe
3 drinking-water level. July 1, 2004 Transcript, p. 86.

4
5 In 2003, DOE announced that there were over 400,000 cubic meters of radioactively contaminated
6 soil at the facility, but that it had decided to clean up only about 5,000, leaving 99% of the contaminated
7 soil in place, and that it intends to then release the site for unrestricted residential use. Dan Hirsch,
8 Committee to Bridge the Gap, letter to Dennis Dickerson, LARWQCB, Oct. 20, 2003, p. 2. U.S. EPA
9 has formally found the cleanup inadequate, saying that the only safe use under the circumstances would
10 be restricted day hikes with limits on picnicking. May 6, 2004 Transcript, pp. 91-92.

11
12 DTSC has undertaken a substantial investigation of site contamination since 1996, including 6,000
13 soil samples. July 1, 2004 Transcript, pp.15-20. DTSC's sampling data shows that there are substantial
14 concentrations of dioxins and metals throughout the site, concentrations that are well in excess of the
15 background soil and ash concentrations that Boeing now claims are responsible for permit violations.
16 DTSC, Preliminary RCRA Field Investigation ("RFI") data, June 7, 2004, Declaration of Bruce A. Bell
17 in Opposition to The Boeing Company's Appeals of Orders Nos. R4-2004-0111, R4-2006-0008, and
18 R4-2006-0023 ("Bell Decl."), ¶¶ 28-30. DTSC indicates that this site contamination was caused by
19 rocket testing, laboratories, component-test labs, fuel farms, loading facilities, and other testing areas
20 and included solvents, PCBs, PAHs, metals, propellants, perchlorate, and hydrocarbon. July 1, 2004
21 Transcript, pp. 27-28.

22 23 24 **Offsite Migration of Contaminants**

25 The contaminated site is atop the Santa Susana mountains, overlooking communities such as Simi
26 Valley; what runs off will move down towards those populated areas. May 6, 2004 Transcript, p. 83.
27 Bell Canyon, to which the site drains, has a population of 1,500 people, including children playing in the
28 creeks, and houses with creeks on-site. *Id.*, pp. 108-111. Newly approved development will add 1,000

1 more people. *Id.*, p. 109. The Susana Knolls community is directly below the facility; children play in
2 streams running through the community and its two parks, and those streams carry runoff from the site.
3 *Id.*, pp. 118-119. Facility discharges also travel through the West Hills neighborhood immediately
4 adjacent to the site. July 1, 2004 Transcript, pp. 112-113.
5

6 The Regional Board has concluded that industrial contaminants from the facility are discharged
7 through storm water. It has concluded that storm water discharges at outfalls 003-010 capture runoff
8 contaminated by numerous areas on site, including a Radioactive Material Handling Facility, a Sodium
9 Reactor Experiment; two former Sodium Burn Pits; the Area 1 and Area 2 Landfills; a former LOX
10 plant; an instrumentation lab contaminated by mercury and undergoing soil removal; and a former solid
11 rocket propellant testing area for which a major propellant was perchlorate. July 2004 WDRs, pp. 10-
12 12; July 2004 Fact Sheet, pp. 10-12. The Regional Board also noted that “[m]any of the areas
13 discharging wastewater to the drainage areas and streambeds are associated with activities that are being
14 regulated by DTSC under RCRA.” July 2004 WDRs, p. 8. Outfalls 003-010, which discharge to the
15 north and east, as well as outfalls 001-002, 011, and 018, which discharge to the south, drain many of
16 these RCRA Solid Waste Management Units and Areas of Concern. See Storm Water Pollution
17 Prevention Plan for Santa Susana Field Laboratory, November 2004, Revised December 2005, Figures
18 2-7 (Figure 2 showing drainage divides, other figures showing detailed facilities); RFI data (identifying
19 SWMUs and AOCs).
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23 Permitted industrial wastewater includes treated groundwater from which VOCs, but not metals or
24 perchlorate, are removed. July 2004 WDRs, p. 3. This wastewater, other wastewater used for rocket
25 test quenching, sewage treatment wastewater, and storm water may all be commingled and stored for
26 reuse at a series of on-site ponds. *Id.* pp. 3-9, 13. When the supply of reclaimed water exceeds reuse
27 requirements or storm water flows exceed storage capacity, the water is discharged through a system of
28

1 interconnected ponds, including the Perimeter Pond, the Pond R-2 Spillway, and, eventually, outfalls
2 011, 001, 018, and 002. *Id.*, pp. 4-9, 13.

3 Because many of these ponds and interconnecting water courses are unlined, they may deposit
4 contaminants on surface soils or percolate them to groundwater, and subsequent discharges may
5 transport the contaminants offsite. *Id.*, p. 13. The ponds “collect wastewater from a number of areas
6 that may contribute constituent concentrations to the discharge.” *Id.* The Regional Board also
7 concluded that prior and ongoing testing of rocket engines makes it “likely that contaminants associated
8 with the engine test material would be present in the storm water runoff from the area.” *Id.*, p. 10.

9 Surface runoff has in fact transported contaminants offsite to the Brandeis-Bardin Camp Institute
10 property. May 6, 2004 Transcript, pp. 82-83. Perchlorate has migrated off site via surface water and is
11 found in wells in Simi Valley and the Ahmanson ranch development. *Id.*, pp. 87-89; January 19, 2006
12 Transcript, p. 118-119. Radioactive contamination has been found at the Sage Ranch and the Brandeis-
13 Bardin Camp Institute. *Id.*, pp. 87-89. DCA/TCA’s, perchlorate, dioxin, and radionuclides have been
14 found offsite at Ahmanson ranch; and TCE and perchlorate have been found in Simi Valley drinking
15 water. *Id.* pp. 108-111; January 19, 2006 Transcript, p. 118-119. Boeing settled a lawsuit for tens of
16 millions of dollars with nearby residents for damages from offsite contamination. A local ordinance
17 now requires developers within two miles of the site to test soil for contaminants from the site before
18 building. January 19, 2006 Transcript, p. 34.

23 **Compliance History**

24 Boeing’s environmental compliance history involves violations of federal law as well as numerous
25 violations of Regional Board orders. In 1994, an explosion at the site killed two workers, triggering an
26 FBI raid and indictment of the company by the U.S. Attorney. May 6, 2004 Transcript, p. 93-94. The
27 company initially claimed that the workers died doing legitimate research, but later admitted that it was
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1 actually conducting illegal airborne burning of hazardous waste. The company pled guilty to multiple
2 felony environmental crimes involving illegal disposal of hazardous materials. Id; see also, January 19,
3 2006 Transcript, pp 89-91, 106-107.

4 The Regional Board has cited Boeing for numerous violations of permit limitations, resulting in
5 Notices of Violations and fines. May 6, 2004 Transcript, pp. 65-66; January 2006 Fact Sheet, pp 12-16.
6 In July 1998, a new NPDES permit imposed numeric effluent limitations on outfalls 001-007.
7 LARWQCB, Order No. 98-051, July 1998 (“1998 Permit”). Boeing began to violate those limits two
8 months later in August 1998 and continued to violate that permit throughout its term. July 2004 Fact
9 Sheet, pp. 13-14. New effluent limits were imposed in the July 2004 WDRs; Boeing exceeded these
10 limits at least 49 times in the 2004-2005 rain season. January 2006 Fact Sheet, pp 12-16. Notices of
11 Violation were issued for these exceedances. Jonathan Bishop, letters to Steve Lafflam, Mar. 14, 2005
12 and Oct. 7, 2005. Additional violations occurred for which NOV’s were not issued during this period:
13 for example, strontium-90 exceeded permit limits at outfall 003 on April 28, 2005. Steve Lafflam, letter
14 to LARWQCB, Information Technology Unit, Aug. 12, 2005, 2nd Quarter 2005 NPDES Discharge
15 Monitoring Report Submittal, page 5.

19 **Necessity for Numeric Effluent Limits**

20 As a result of its poor compliance history, the Regional Board concluded that best management
21 practices (“BMPs”) alone were insufficient and that numeric effluent limitations were required:
22 “[p]revious attempts to utilize BMPs to control the transport of contaminants offsite have proven
23 ineffective, as is demonstrated by the effluent limitation exceedances noted from Outfalls 003 to 007 . .
24 ..” July 2004 Fact Sheet, p. 11. The Regional Board found that “persistent transport of these
25 contaminants offsite in storm water requires that these contaminants have effluent limits.” July 2004
26 WDRs, p. 9. As a result, the Regional Board reimposed some existing numeric limits from the 1998
27 permit and imposed additional numeric limits at outfalls 001-007 in the July 2004 WDRs. In some
28

1 instances these limits were stricter than the 1998 permit limits due to changes in the Basin Plan and the
2 adoption of the California Toxics Rule. Boeing filed a perfunctory appeal of the July 2004 order, but
3 did not seek to resolve any of the issues it raised, instead placing that appeal in abeyance for 18 months.
4
5 Petition for Review of Waste Discharge Requirements, August 1, 2004 (“Boeing Petition, August
6 2004”).

7 Prior to the 2004 permit, no effluent monitoring data had been collected for several outfalls
8 discharging storm water, including 009-010, 011, and 018; and only limited monitoring data were
9 collected for outfall 008. Although there was abundant evidence other than effluent monitoring data that
10 would have justified the Regional Board in imposing effluent limits on these outfalls in its July 2004
11 order, the Regional Board refused to do so without effluent monitoring data. See CBG’s Memorandum
12 of Points and Authorities in Support of Petition for Review of Regional Board Action, July 30, 2004.
13

14 The Regional Board did, however, direct Boeing to submit monitoring data showing detection of
15 relevant parameters at these outfalls within 24 hours, and required its staff to promptly determine
16 whether the permit should be reopened to add additional numeric effluent limitations. July 2004 WDRs,
17 p. 42. Because staff did not bring reopeners to the Regional Board, CBG and others obtained and
18 evaluated the monitoring data and advised the Regional Board that it clearly justified additional numeric
19 limits. CBG *et. al.*, letter to Susan Cloke, RWQCB, October 5, 2005. Monitoring data for the period
20 August 2004 through April 2005 showed dozens of discharges at previously unregulated outfalls that
21 contained constituent concentrations exceeding the 2004 permit limits for these parameters at the
22 regulated outfalls. *Id.* Subsequently, the Regional Board acted to impose additional limits on January
23 19 and March 9, 2006 based on its evaluation of this monitoring data.
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26 **Consideration of a Compliance Schedule**

27 After it became apparent that additional limits might be imposed and that enforcement action might
28 be taken for its continuing permit violations, Boeing sought to persuade the Regional Board to grant it a

1 compliance schedule that would retroactively and prospectively relieve it of the obligation to comply
2 with the new numeric limits. Steve Lafflam, letter to Jonathan Bishop, July 15, 2006. In support of its
3 claim that compliance with permit limits was not feasible, Boeing argued only that it had not in fact
4 complied, that the limits were stricter, and that it had not had time to “determine if compliance could be
5 met.” *Id.*, pp. 3-5. Boeing proposed that its permit be reopened to eliminate the new permit limits and
6 that it be allowed five more years of monitoring to collect data and consider new BMPs. *Id.*, pp. 5-7.

8 Before the Regional Board staff responded to this request, the Topanga fire burned through a portion
9 of the site on September 29, 2005. Blythe Poenk-Bacharowski, letter to Steve Lafflam, Nov. 10, 2005.
10 Boeing reacted by restoring the BMPs and undertaking temporary erosion control measures. Boeing,
11 Best Management Practice’s [sic] Review, Dec. 13, 2005.

13 On November 15, the Regional Board staff advised Boeing that its request for some form of interim
14 limits and a compliance schedule would be considered at the January 2006 meeting, the meeting at
15 which additional numeric limits would also be proposed. Jonathan Bishop, letter to Steve Lafflam, Nov.
16 15, 2006, pp. 1, 10. However, staff pointed out that Boeing had previously declined a compliance
17 schedule for the July 2004 permit. *Id.*, pp. 2-3, 6-7. Staff also pointed out that “it is unlikely that
18 elevated concentrations of contaminants noted in the discharges are from sources other than Boeing,”
19 and that, in any event, Boeing is responsible to “ensure that site soils and associated contaminants
20 remain on the site.” *Id.*, pp. 4, 7. Staff pointed out that limits were based on a robust set of monitoring
21 data and that Boeing had long been aware that limits would be made more stringent. *Id.*, p. 7-9.
22 Nonetheless, staff agreed to present Boeing’s request to the Regional Board in the form of a proposal for
23 a Cease and Desist Order with interim limits or a Time Schedule Order at the January 2006 hearing. *Id.*
24 at 10.

1 Regional Board staff issued a draft Cease and Desist Order on December 19, 2005. Blythe Ponak-
2 Bacharowski, letter to Steve Lafflam, Dec. 19, 2005. After reviewing comments by Boeing and
3 interested parties, including CBG, staff dramatically reduced the proposed compliance period and
4 tightened the proposed interim limits in the draft Cease and Desist Order. As discussed more fully
5 below, at its January 19, 2006 meeting, after extensive testimony by interested parties including CBG,
6 Boeing's consultant, and Boeing's attorney, the Regional Board properly declined to adopt a Cease and
7 Desist Order.
8

9 Following the Regional Board's January 19 and March 9, 2006 decisions to impose additional
10 numeric limits and to deny the proposed Cease and Desist Order, Boeing filed appeals of those actions
11 and asked that its dormant appeal of the 2004 permit be taken out of abeyance.
12

13 **III. ARGUMENT**

14 **A. Numeric Water Quality-Based Effluent Limits Are Proper For Industrial Storm Water** 15 **Permits**

16 Boeing's argument that the Regional Board somehow exceeded its authority in imposing numeric
17 effluent limits is incorrect. Boeing consistently confuses the exceptional situation for storm water
18 general permits, in which numeric limitations are not yet required, with the general rule that numeric
19 limitations for individual industrial storm water permits are proper and essential to ensure that water
20 quality standards are met whenever there is sufficient data to determine those limits. In fact, the Clean
21 Water Act *requires* the Regional Board to impose water quality based effluent limits where there is a
22 reasonable potential that discharges may cause or contribute to violation of water quality standards.
23

24 The State Board should not abdicate this legal obligation in favor of the vague policy arguments
25 Boeing has advanced. Proper numeric limits for individual permits should not be put on hold just
26 because policy groups are evaluating storm water regulations.
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1 **1. Numeric Effluent Limitations Are Authorized For Industrial Storm Water Discharge**
2 **Permits When Necessary To Meet Water Quality Standards And Information Is Available**
3 **To Determine The Limits**

4 Numeric water quality-based effluent limitations (numeric WQBELs) are clearly authorized by the
5 Clean Water Act for industrial storm water discharge permits. *Defenders of Wildlife v. Browner*, 191
6 F.3d 1159, 1164-1165 (9th Cir. 1999) makes clear that that Congress intended industrial storm water
7 dischargers to comply with the requirements of 33 U.S.C. § 1311(b)(1)(C), which include numeric
8 limitations where necessary to meet state water quality standards. This is apparent from the language of
9 33 U.S.C. 1342(p)(3)(A), which requires that “[p]ermits for discharges associated with industrial activity
10 shall meet all applicable provisions of this section and section 1311 of this title.” *Id.*, emphasis added.
11

12 In *Defenders of Wildlife*, the court noted that the Clean Water Act distinguished the obligations of
13 industrial storm water dischargers from those of municipal storm water discharges,. Municipal
14 dischargers need control discharge of pollutants “to the maximum extent practicable” by employing best
15 management practices, i.e., “management practices, control techniques and system, design and
16 engineering methods,” and, the Court noted, they must also comply with “such other provisions as the
17 Administrator . . . determines appropriate for the control of such pollutants.” *Id.* at 1164, quoting 33
18 U.S.C. 1342(p)(3). However, industrial storm water dischargers are required to “meet all applicable
19 provisions of [section 1342] and section 1311 of this title.” *Id.* at 1164, quoting 33 U.S.C. 1342(p)(3),
20 emphasis added. Thus, while the implementation of best management practices to control pollutants to
21 the maximum extent practicable may be the technology-based standard for municipalities, it is clearly
22 not the technology-based standard for industrial dischargers. Furthermore, while *Defenders* stated that
23 municipal dischargers were not required in all instances to “strictly comply” with water quality
24 standards, the Ninth Circuit expressly found other otherwise for industrial dischargers (like Boeing). In
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1 all cases, without exception, they must actually meet the requirements of section 1311, under which
2 numeric limitations may be imposed where necessary to meet state water quality standards.

3 Indeed, the State Board anticipated *Defenders of Wildlife* in 1998, observing that “CWA Section
4 402(p) specifies that permits for industrial discharges are required to comply with all technology-based
5 and water quality-based requirements. (Section 402(p)(3)(A).)” In the Matter of Petition of
6 Environmental Health Coalition, Order WQ 98-01, fn. 4.

8 EPA policy requires numeric limitations in individual storm water permits wherever feasible, that is,
9 whenever there are sufficient data to determine the limits. EPA, Interim Permitting Approach for Water
10 Quality-Based Effluent Limitations in Storm Water Permits, 61 Fed. Reg. 43761, Aug. 26, 1996. And
11 EPA reiterated that numeric limitations are appropriate for toxic pollutants in storm water flows
12 wherever possible when it promulgated the California Toxics Rule (40 C.F.R. Part 131.38, the “CTR”),
13 citing *Defenders of Wildlife*. CTR, 65 Fed. Reg. 31682, 31703, May 18, 2000.

15 WQBELs are *mandatory* when necessary to meet water quality standards, including toxics standards.
16 40 C.F.R. § 122.44(d)(1). The test is whether the Regional Board finds that a pollutant “may be
17 discharged at a level which will cause, or have the reasonable potential to cause, or contribute to an
18 excursion above any State water quality standard . . .” *Id.* And this is precisely what the Regional
19 Board found here:
20

21 “Storm water sampling events during 1999, 2000 and 2001 yielded exceedances of existing
22 effluent limitations for several contaminants of concern. These effluent violations indicate that
23 the implementation of best management practices (BMPs) to control the transport of
24 contaminants offsite were not effective. Previous attempts to utilize BMPs to control the
25 transport of contaminants offsite have proven ineffective as is demonstrated by the effluent
26 limitation exceedances noted from Outfalls 003 through 007 on page 11 of the Fact Sheet. . .
27 Hence, this Order includes effluent limitations for the storm water discharges from the site for
28 priority pollutants with reasonable potential.” July 2004 Fact Sheet, p. 11, emphasis added.

The Regional Board was also authorized to impose WQBELs using Best Professional Judgment, which
in some instances it did. 33 U.S.C. § 1342(a)(1)(B). Finally, the Regional Board has the authority and

1 duty to set numeric WQBELs for those parameters for which TMDLs have been established, as it did.
2 33 U.S.C. § 1313(d).

3 Boeing argues only that numeric WQBELs are not *required* for storm water permits in all instances.
4 This argument simply misses the point that numeric WQBELs are clearly authorized and were
5 appropriate here.
6

7 Boeing's argument is based on an exception to the general rule that numeric WQBELs are
8 presumptively proper – *an exception that does not apply in this case*. Boeing points to a provision
9 authorizing BMPs where numeric effluent limitations are infeasible. 40 C.F.R. § 122.44(k)(3). But this
10 provision only applies when the *determination of effluent limits* is infeasible due to lack of data; it does
11 not apply by virtue of Boeing's claim that *compliance* is infeasible, contrary to Boeing's argument.
12 Boeing Memorandum of Points and Authorities, Mar. 16, 2006 ("Boeing MPA"), p. 23. Reading the
13 infeasibility provision of 40 C.F.R. § 122.44(k)(3) to refer to the infeasibility of compliance rather than
14 the infeasibility of determining permit limits would be redundant and render the provision superfluous,
15 because compliance infeasibility is directly addressed elsewhere in the regulations, *e.g.*, in the
16 provisions for compliance schedules. 40 C.F.R. § 131.38(e)(3) (discharger may request compliance
17 schedule for toxics if compliance is infeasible). The infeasibility referenced in 122.44(k)(3) is the
18 infeasibility of determining permit limits, as is evidenced by EPA policy speaking directly to this issue:
19 EPA requires that numeric limitations be incorporated into individual storm water permits whenever, as
20 here, there is sufficient information to develop them:
21
22
23

24 "Due to . . . the typical lack of information on which to base numeric water quality-based
25 effluent limitations . . . EPA will use an interim permitting approach [using BMPs]. *In cases*
26 *where adequate information exists to develop more specific conditions or limitations to meet*
27 *water quality standards, these conditions or limitations are to be incorporated into storm water*
28 *permits as necessary and appropriate*. This interim permitting approach is not intended to affect
those storm water permits that already include appropriately derived numeric water quality-based
effluent limitations." EPA, Interim Permitting Approach for Water Quality-Based Effluent
Limitations in Storm Water Permits, 61 Fed. Reg. 43761, Aug. 26, 1996.

1
2 Where there is no site-specific data to support a reasonable potential analysis, *e.g.*, for storm water
3 *general* permits, section 122.44(k)(3) authorizes use of BMPs in lieu of numeric limits. However, as
4 discussed below, here there was ample site-specific data, including extensive effluent monitoring data,
5 to support reasonable potential analysis and the determination of limits for the Boeing facility.
6

7 Boeing also argues that the WQBELs mandated by section 122.44(d)(1) need not be numeric, citing
8 *Communities for a Better Environment v. State Water Resources Control Board* (2003) 109 Cal.App.4th
9 1089, 1104-1105. Again, Boeing confuses the exception with the rule. While a WQBEL may under
10 some exceptional circumstances be non-numeric, “in most cases, the easiest and most effective
11 chemical-specific limitation would be numeric.” *Id.*, at 1105, quoting *In the Matter of the Petition of*
12 *Citizens for a Better Environment et al.*, WQ 91-03, May 16, 1991.
13

14 Boeing claims application of numeric limits to storm water is forbidden by a footnote in the Policy
15 for Implementation of Toxic Standards for Inland Surface Waters, Enclosed Bays, and Estuaries of
16 California (State Implementation Policy or SIP). Not so. Footnote 1 provides only that the policy of
17 *requiring* numeric limitations does not apply to storm water.¹ The footnote certainly does not exempt
18 storm water discharges from CTR criteria where information exists to develop limits. CTR, 65 Fed.
19 Reg. 31682, 31703, May 18, 2000. And, as discussed below, the Regional Board has the discretion to
20 employ the SIP’s methodologies for reasonable potential analysis and derivation of limits for storm
21 water using its best professional judgment and as specifically permitted by EPA guidance. See section
22 B1, below.
23
24

25 Finally, Boeing ignores the fact that Boeing’s outfalls are permitted to discharge both industrial
26 wastewater and storm water. The exception Boeing cites under 40 C.F.R. § 122.44(k)(2) that allows
27

28 ¹ The apparent concern in the SIP’s footnote 1 is to render the SIP consistent with the omission of
numeric limits in general permits for industrial, construction, and municipal storm water, which the

1 BMPs “where authorized under section 402(p) of the CWA” applies only to “discharges composed
2 *entirely* of storm water.” 33 U.S.C. § 1342(p)(1). Storm water includes “storm water runoff, snow melt
3 runoff, and surface runoff and drainage,” but does not include commingled process water. 40 C.F.R. §
4 122.26(b)(13). Outfalls 001, 002, 011, and 018 are clearly permitted to discharge process water, so there
5 is simply no basis in statute or regulation to bar numeric limits for outfalls 001, 002, 011, and 018. And,
6 as Regional Board staff has indicated, outfalls 003-018 “may not accurately be characterized as storm
7 water only, but as commingled wastewater and storm water,” because the storm water is contaminated
8 by Solid Waste Management Units. Jonathan Bishop, letter to Steve Lafflam, Nov. 15, 2005, p. 13; *see*
9 Storm Water Pollution Prevention Plan for Santa Susana Field Laboratory, November 2004, Revised
10 December 2005, Figures 2-7 (Figure 2 showing drainage divides, other figures showing detailed
11 facilities including SWMUs and AOCs); RFI data (identifying SWMUs and AOCs). Thus it is improper
12 to regulate Boeing’s outfalls discharging commingled storm water as if they were subject to the
13 exception in 40 C.F.R. § 122.44(k)(2).
14
15
16

17 **2. Ongoing Policy Review For General Permits Does Not Preclude Numeric Limits In** 18 **Individual Permits**

19 Boeing argues that numeric limitations are “premature” in light of ongoing policy reviews of storm
20 water controls. Boeing MPA, p. 44. However, the fact that there are various policy groups considering
21 storm water regulation issues does not compel, or even suggest the need for, *ad hoc* changes to existing
22 individual permits in response to possible future policy changes – changes that may not even affect
23 regulation of the Boeing facility. None of these policy groups has been asked to consider eliminating
24 numeric limits in *individual* permits – the response Boeing suggests the State Board anticipate. Indeed,
25 most of their work appears to be focused on *extending* numeric limits to *general* permits. For example,
26 the Blue Ribbon Panel is charged to answer specific questions about implementing numeric limits, and
27
28

footnote specifically identifies in its next two sentences.

1 their answers “should address industrial *general* permits, construction *general* permits, and area-wide
2 municipal permits.”²

3 While Boeing has asked that it be subject only to the industrial general storm water permit, the
4 Regional Board has properly found it necessary to regulate Boeing under an individual permit because
5 of the unique contamination, the long history of violations, and the fact that BMPs alone have not
6 worked. The State Board should not abandon individual storm water permits with numeric limitations
7 simply because the Blue Ribbon Panel may eventually propose numeric limits for general permits; there
8 is no reason to suppose that a general permit would be a better regulatory approach for the Boeing site.
9

10 And even if the Blue Ribbon Panel or the other policy groups eventually develop policy suggestions
11 applicable to the Boeing facility or to individual permits, there is no reason to let the perfect be the
12 enemy of the good; the Boeing facility requires storm water controls now, using the existing regulatory
13 tools. The issue here is not whether a better policy may come along, but whether the Regional Board’s
14 actions were appropriate and proper. Water Code § 13320. Since the Regional Board must apply
15 existing law, the issues here must be resolved on the basis of that law and not the Regional Board’s, or
16 even the State Board’s, guess as to future policy.
17

18
19 **B. Numeric Water Quality-Based Effluent Limits Were Properly Applied To The SSFL**
20 **Facility**

21 The Regional Board properly undertook reasonable potential analysis to determine whether
22 WQBELs were necessary for the SSFL facility and then properly determined those numeric limits; and
23 it used an approved methodology to do so. Boeing’s claims that this methodology was technically
24 inappropriate are unfounded and not supported by the record.
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² SWRCB, Notice of Public Meeting, NPDES Storm Water Program, Meeting of Storm Water Panel of Experts, emphasis added, (http://www.swrcb.ca.gov/stormwtr/docs/panel_notice.pdf.)

1 **1. Reasonable Potential Analyses Were Required, And Use Of The SIP Protocols Was Proper**

2 Boeing argues that the Regional Board should not have conducted any reasonable potential analysis
3 at all, and that it should not have employed the SIP to do so. Boeing MPA, p. 25. Both these claims are
4 incorrect.
5

6 Independent of the SIP, federal regulations authorize and require the Regional Board to consider
7 whether there is a reasonable potential that discharges will cause or contribute to an excursion above
8 water quality standards for all pollutants, including toxics. 40 C.F.R. § 122.44(d)(1). The Regional
9 Board may not ignore this obligation under the Clean Water Act. A Regional Board decision to impose
10 any WQBEL must be justified by a reasonable potential analysis.³ *Id.*
11

12 As discussed above, footnote 1 in the SIP provides only that numeric limitations are not *required*
13 for storm water; it does not preclude numeric limitations. Thus, there is no reason why the Regional
14 Board could not employ its professional judgment to apply the SIP's protocols to conduct reasonable
15 potential analysis and to set numeric limits where a reasonable potential was found. The SIP is, after all,
16 the EPA-approved method by which the State implements the California Toxics Rule. EPA, *Water*
17 *Quality Standards; Establishment of Numeric Criteria for Priority Toxic Pollutants for the State of*
18 *California; Rule*, May 18, 2000, 65 Fed. Reg. 31681, 31702.
19

20 In an abundance of caution, however, Regional Board staff provided Boeing with additional
21 justification for using the statistical protocols in the SIP in calculating 2004 permit limits. Staff
22 explained that they had used the EPA's Technical Support Document For Water Quality-based Toxics
23 Control ("TSD") to conduct reasonable potential analysis for outfalls 003-007. LARWQCB, Response
24 to Comments, Jan. 14, 2004, pg. 3; LARWQCB, Transcript, May 6, 2004, pg. 60. Boeing has
25
26

27 _____
28 ³ Significantly, Boeing does not challenge the Regional Board's authority to impose *non*-numeric WQBELs. Boeing MPA, p. 23. For that reason alone, Boeing must concede that reasonable potential analysis was proper and essential.

1 acknowledged that numeric limitations were based on the TSD. Boeing MPA, p. 25; Paulsen Decl., ¶
2 11. Use of this EPA guidance document is justified in light of the Regional Board's obligation to carry
3 out the objectives of federal law. *WaterKeepers Northern California v. State Water Resources Control*
4 *Bd.* (2002) 102 Cal.App.4th 1448, 1458. Staff explained that the TSD authorizes use of either the
5 statistical approach outlined in the TSD or "an analogous approach developed by a regulatory
6 authority," *e.g.*, the statistical approach in the SIP. EPA, TSD, § 3.3.8, Mar. 1991, pg. 64. Thus, use of
7 the SIP protocols were independently justified by EPA guidance.
8

9 Because use of the SIP protocols was proper in this case, Boeing's contentions about
10 impermissible underground rulemaking are without merit. The Regional Board has not "amended" or
11 "embellished" the SIP as Boeing claims. Boeing MPA, p. 28. It has simply applied its protocols for
12 determining toxics limitations to determine toxics limitations.
13

14 Staff properly used the SIP on its own terms to evaluate discharges from outfalls 001, 002, 011,
15 and 018, which are permitted to discharge industrial waste water as well as storm water. Because
16 Boeing is clearly permitted to discharge industrial waste water from these outfalls, numeric limits based
17 on the SIP protocols are appropriate. Indeed, in its 2004 petition, Boeing made no objection to the use
18 of the SIP to establish limits in the 2004 permit outfalls 001 and 002. Boeing Petition, August 1, 2004,
19 pp. 7-8.
20

21 Finally, the SIP was *not* used to determine reasonable potential for the non-priority pollutants.
22 Instead, the TSD's statistical methodology for evaluating reasonable potential was used to determine
23 that there was a reasonable potential for exceedances for such constituents as iron, manganese, TSS,
24 perchlorate, nitrate + nitrite as nitrogen, and TDS. January 2006 WDRs, p. 30, ¶ 81. Based on this
25 analysis, limits for these parameters were found to be justified.
26
27
28

2. The Reasonable Potential Analyses Were Done Properly

As Dr. Bell has pointed out, the reasonable potential analysis (“RPA”) was done properly. Bell Decl., ¶ 10. Using water quality objectives contained in the CTR, the NTR and the Basin Plan, the Regional Board evaluated proper triggers in the reasonable potential analysis using a robust data set. *Id.* For most of the critical constituents, the reasonable potential analysis was based on a determination that there was a statistical probability that the maximum effluent concentration would exceed the relevant criteria.

Essentially all of the limits for metals and dioxin about which Boeing is apparently concerned were justified by this statistical reasonable potential analysis based on extensive effluent data. For the northern outfalls 003-007, reasonable potential was found using CAPWTT (a statistical analysis tool) in the July 2004 permit for cadmium, copper, mercury, lead and dioxin. July 2004 Fact Sheet, Attachment 2. Effluent data collected after 2004 justified applying those same limits to northern and eastern outfalls 008-010. January 2006 WDRs, ¶ 82. Statistical reasonable potential was also found for total suspended solids, perchlorate, boron, sulfate, total dissolved solids, oil and grease, and nitrate + nitrite as nitrogen for outfalls 003-010 in January 2006. These statistical analyses were based on dozens of data points.⁴

The reasonable potential analyses for the southern outfalls 001, 002, 011, 018 were similarly conservative for these key constituents. Statistical reasonable probability was found in the July 2004 permit for copper, lead, mercury, and dioxin (TCDD). July 2004 Fact Sheet, Attachment 1. This was confirmed again in January 2006, at which time staff also found statistical reasonable probability for the southern outfalls for iron, manganese, total suspended solids, MBAS, perchlorate, nitrate + nitrate as

⁴ See for example Attachment 2 to the July 2004 Fact Sheet, setting out the reasonable potential analyses for outfalls 003-007 showing that 136 samples were evaluated for cadmium, 140 for copper, 184 for mercury, and 57 for dioxin (TCDD).

1 nitrogen, oil and grease, BOD, and total dissolved solids. January 2004 WDRs, ¶ 81. Again, the
2 analyses were based on dozens of data points.⁵

3 Thus, the Regional Board imposed limits for most of the key constituents at issue here (those for
4 which Boeing sought a stay - see Order WQ 2006-0002, Exhibit A) only where the reasonable potential
5 analysis could be based on extensive effluent data. In fact, Committee to Bridge the Gap and other
6 parties objected in May and July 2004 to the Regional Board's refusal to impose limits without effluent
7 monitoring data, arguing that limits could properly have been imposed based on Best Professional
8 Judgment. See CBG's Memorandum of Points and Authorities in Support of Petition for Review of
9 Regional Board Action, July 30, 2004. However, the Regional Board was adamant that it would not
10 impose the limits without effluent data.⁶

13 Ironically, the conclusive evidence that the reasonable potential analysis was properly done is the
14 fact that effluent concentrations subsequently exceeded the numeric water quality-based effluent limits
15 set for most of the constituents about which Boeing is apparently concerned. Bell Decl., ¶ 9.

17 **3. Boeing's Merely Theoretical Objections To The Determinations Of Limits Are Unfounded**
18 **And Not Supported By The Record**

19 Boeing also makes various objections to the determination of numeric limits, arguing that the wrong
20 model was used, background water quality should have been considered, and variability was not
21 considered. Boeing MPA, pp. 25-26; Paulsen Decl., ¶¶ 11, 12, 14. As Dr. Bell has pointed out,
22 Boeing's theoretical claims are directly contradicted by technical guidance documents and their
23 relevance is not factually supported by the record. Bell Decl., ¶¶ 11-22. And Boeing has not provided
24

25
26 ⁵ See for example Attachment 1 to the July 2004 Fact Sheet, setting out the reasonable potential
27 analyses for the outfalls 001-002 showing that 72 samples were evaluated for copper, 76 for iron, 78 for
28 mercury, and 56 for dioxin (TCDD).

⁶ Indeed, in July 2004 it removed the limit for lead that had been in the 1998 permit at outfalls
003-007 because statistical reasonable potential was not found based on effluent monitoring data, and
refused to reinstate the lead limit until January 2006, when it found that effluent data collected in 2004-
2005 did justify the limit. January 2006 WDRs, p. 31, ¶ 82.

1 detailed, site-specific objections to any of the Regional Board's determinations of limits; its sweeping
2 claims provide no basis on which the State Board could grant relief.

3 *Intermittent Flows and Background Water Quality:* Boeing objects that limits should not be set for
4 intermittent discharges, claiming that the SIP and the TSD do not apply to such discharges. Boeing
5 MPA, p. 25, Paulsen Decl., ¶ 11. Boeing also claims that background water quality should have been
6 considered, citing Paulsen's declaration for support. Boeing MPA, p. 26, citing Paulsen Decl., ¶ 12. In
7 fact, Paulsen's declaration does not mention background waters. At any rate, both of these objections
8 are unfounded.
9

10 First, as Dr. Bell explains, background water quality was not relevant because beneficial uses are
11 intermittent. Bell Decl., ¶ 12; January 2006 WDRs, ¶¶ 43, 44; July 2004 Fact Sheet, pp. 24, 33.
12 Boeing's discharges dominate the local waters, constituting the headwaters for Bell Creek and Dayton
13 Canyon Creek and representing a significant portion of the headwaters for the Arroyo Simi. Bell Decl.,
14 ¶¶ 13-15; January WDRs, pp. 23, 25. People live around, use, and recreate in the intermittent creeks
15 leaving the site; and local property and the community are exposed to and harmed by Boeing's
16 contaminants. January 19, 2006 Transcript, pp. 34, 109-110, 118-119, 121-123 (millions of dollars in
17 damages paid for offsite contamination; adjacent property contaminated); May 6, 2004 Transcript, pp.
18 82-83, 87-89, 108-111, 118 (developed and developing property and water supplies contaminated;
19 children play in streams from site); Jul. 1, 2004 Transcript, 112-113 (discharges flow through local
20 development). Indeed, some of the beneficial uses the Regional Board sought to protect with numeric
21 limits are *on-site* wildlife habitat – clearly subject only to intermittent flows from storm water. January
22 2006 WDRs, p. 13; LARWQCB, Comment Responses, Dec. 19, 2003, pp. 2-3; May 6, 2004 Transcript,
23 pp. 72-73.
24
25
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1 Second, as Dr. Bell explains, the methods for conducting reasonable potential analysis and
2 determining permit limits set out in the SIP and the TSD are nowhere limited to continuous flows. Bell
3 Decl., ¶ 12. Indeed, many intermittent industrial storm water dischargers are subject to numeric
4 WQBELs based on application of the TSD. *Id.*

5
6 *Static vs. Dynamic Model:* In effect admitting that numeric limits *can* be established for storm
7 water discharges, Boeing's consultant simply quarrels with the choice of models, arguing that a dynamic
8 rather than a static model should be used. Paulsen Decl., ¶ 12; Boeing MPA, p. 26, n. 20.

9
10 However, the TSD does not provide that dynamic modeling must be used with storm flows. Bell
11 Decl., ¶ 11. In fact, the TSD *recommends* that the alternative steady-state model should be used by
12 permitting authorities in most cases, especially "where daily receiving water flow records are not
13 available." TSD, p. 97; Bell Decl., ¶ 11. Here, not only were there no daily flow records, there were no
14 available receiving flow data at all for Arroyo Simi, to which the northern outfalls discharge. Bell Decl.,
15 ¶ 14; July 2004 Fact Sheet, pg. 24.

16
17 However, even if this data had been available, it would not have made a difference. The
18 Regional Board found that facility discharges dominate the flows to the intermittent creeks and the
19 protected beneficial uses are themselves intermittent. July 2004 Fact Sheet, pp. 24, 33. The purpose of
20 dynamic modeling is to take into account the assimilative capacity of receiving waters so that permit
21 limits can be based on receiving water concentrations. TSD, p. 98; Bell Decl., ¶ 11. But here
22 assimilative capacity is irrelevant because facility discharges make up essentially all of the local flows
23 for which beneficial use protection must be afforded. Bell Decl., ¶¶ 13-15, 17. In short, end-of-tailpipe
24 concentrations are the relevant measure because there is no dilution. Fact Sheet, July 1, 2004, pg. 33.
25
26
27
28

1 And for just this reason the Regional Board also found that it was not necessary to consider background
2 water quality.⁷ *Id.*

3 Boeing has not met its burden in any event. The record contains no technical justification for
4 Boeing's contention that limits derived through dynamic modeling or considering background water
5 quality would have been adequately protective of receiving waters and beneficial uses. The record does
6 not even contain an argument that limits set using a different model would have been *different*. The
7 unsupported theoretical assertions by Boeing's consultant, with no application to the existing facts, does
8 not constitute credible evidence that permit limits were not proper. Indeed, as staff pointed out, Boeing
9 failed even to provide any background data for receiving water, as it was obliged to do if it believed that
10 this information would be relevant. LARWQCB, comment responses, Jan. 14, 2004, p. 13; Water Code
11 §§ 13260, 13267; SIP, § 1.2, p. 5.

14 *Variability:* Similarly, Boeing's claim that the SIP and the TSD do not take variability into
15 account is incorrect. Paulsen Decl., ¶ 11. Both the SIP and the TSD expressly take the coefficient of
16 variation ("CV") into account in setting limits. TSD, pp. 105-110; SIP, pp. 7-14. The CV can be
17 directly calculated whenever there are more than 10 samples. TSD, p. 53, Box 3-2. Here, as noted
18 above, there were scores of effluent monitoring data points for most parameters so that variability was
19 taken into account by evaluation of a substantial mass of effluent data. Bell Decl., ¶¶ 16-18.

22 Where data were not sufficient to calculate the CV, staff used a default value of 0.6, which was
23 generally lower than calculated CV. *Id.*, ¶ 18. Since the lower the CV, the less stringent the limit, the
24 use of the default value resulted in *less* stringent limits than might be warranted if more data were

28 ⁷ Note also that the CTR criteria are ambient criteria that define attainment of beneficial uses and
are therefore properly applied to all water bodies without considering pollutant-specific and site-specific
effects. CTR, 65 Fed.Reg. 31687, May 18, 2000.

1 available. *Id.* This directly refutes Paulsen's assertion that limits were set too strictly by failing to
2 account for variability. Paulsen Decl., ¶ 14.

3 Furthermore, as Dr. Bell points out, variability is irrelevant to determining numeric limits when
4 intermittent uses are to be protected, because there is no dilution calculation, which would otherwise
5 need to account for variability. Bell Decl., ¶ 17. Again, because site discharges dominate local flows
6 and there is no dilution, it is proper to set the limits based on end-of-pipe concentrations. July 2004 Fact
7 Sheet, pg. 33.

8
9 *Design Storm:* Boeing objects that its permit fails to specify a design storm for which it can
10 engineer its treatment systems. Boeing MPA, p. 44; Paulsen Decl., ¶ 15. As Dr. Bell explains, this
11 objection is without merit. Bell Decl., ¶¶ 19-21. Because large storms will dilute pollutant
12 concentrations, exceedances are not more likely. *Id.*, ¶ 20. Furthermore, Boeing does not face a unique
13 challenge in this regard. *Id.*, ¶ 21. If extraordinary conditions were truly responsible for exceedances,
14 they could be accounted for through enforcement discretion or in determination of penalties.

15
16
17 *Fire Effects:* Boeing argues that the Regional Board should have taken the 2005 Topanga fire into
18 account in setting permit limits. Boeing MPA, p. 26, 31. Boeing has employed the 2005 Topanga fire
19 in so many rhetorical contexts that it takes some unraveling to see exactly what significance it has, if
20 any.

21 Preliminarily, the 2005 Topanga fire could not have been considered in adopting the 2004 permit
22 limits, *because it had not yet occurred.* Despite this, Boeing does quite absurdly object to the Regional
23 Board's failure to consider the 2005 fire in calculating numeric limits in the 2004 permit. Boeing MPA,
24 p. 31.

25
26 As explained below, Boeing's exceedances of numeric limits have been due to its industrial
27 pollution of the site, not just the effect of the fire; and Boeing has not established the contrary. See
28

1 section E1, E2, below. Also as explained below, Boeing is responsible for controlling both its own and
2 other sources of pollutants in its discharges, just like any other discharger. See section E3, below. Thus,
3 the fire could not have justified a decision not to impose the additional limits in 2006. Finally, as
4 explained below, Boeing is not entitled to a compliance schedule in its permit in any event, because
5 there is no longer any authority for providing a compliance schedule for toxic pollutants. See section C,
6 below. At most, the fire might have been considered in connection with enforcement action. As Dr.
7 Bell explains, numeric limits are set to protect water quality standards, regardless of the source of
8 contamination, so any consequences of the fire had no place in the limit setting process.⁸ Bell Decl., ¶
9 22.
10
11

12 In sum, Boeing's argument that numeric limits were improperly derived is a red herring – based
13 on misinterpreting a footnote in the SIP and making unsupported and unsupportable claims that more
14 data and different models might have led to different results. Significantly, in its 2004 petition, Boeing
15 raised the issue of the SIP only to argue that footnote 1 barred numeric limits for storm water-only
16 outfalls. Boeing did *not* challenge the use of the SIP to conduct reasonable potential analysis or to
17 derive permit limits in its 2004 petition. Now at the eleventh hour Boeing raises irrelevant
18 methodological issues without even trying to demonstrate that they matter. There is simply no credible
19 evidence that the limits the Regional Board set were inappropriate.
20
21

22 **4. The Regional Board Was Not Obligated To Determine That Immediate Compliance Was** 23 **Feasible Before Imposing Numeric Limits**

24 Boeing takes the position that it is entitled to a permit with which it can immediately comply, and
25 that the Regional Board can only issue or enforce a numeric limitation if the Board itself has first
26

27 ⁸ Although section 5.2 of the SIP provides for site-specific objectives, Boeing has not requested
28 this, funded a study, or submitted a plan; and, as discussed below, Boeing cannot demonstrate that it
cannot achieve permit conditions via treatment, source control, or prevention. Similarly, section 5.3 of
the SIP permitting exceptions is not applicable here absent CEQA compliance, a hearing, a showing that
an exception will not compromise water quality, and a showing that it would serve the public interest.

1 determined that compliance is feasible. Boeing MPA, pp. 30-34. For example, in its first request for a
2 compliance schedule, Boeing complained that discharge limits were imposed at outfalls with only
3 limited data and that “this data was insufficient to determine if compliance could be attained over the
4 life of the permit with the new limits and methods.” Steve Lafflam, letter to Jonathan Bishop, July 15,
5 2005, pg. 5. Boeing complained. In effect, Boeing argues that the Regional Board had to prove that
6 Boeing could comply with limits before it imposed them.
7

8 Boeing is wrong for two reasons. First, it is the discharger’s burden to request a compliance
9 schedule and to provide data to justify it. Water Code §§ 13260, 13267 (discharger is obliged to
10 provide data); SIP, § 1.2, p. 5 (“it is the discharger’s responsibility to provide all data . . . “); 40 C.F.R.
11 § 131.38(e)(3) (discharger must request compliance schedule). Boeing declined a compliance schedule
12 for the 2004 permit, and, as discussed below, the Regional Board had no authority to grant one after
13 May 2005. Jonathan Bishop, letter to Steve Lafflam, Nov. 15, 2005, pp. 2-3, 6-7; see section C, below.
14

15 Second, Boeing’s position conflicts with the fundamental principle that the Clean Water Act is
16 intended to be a technology-forcing scheme. *Natural Resources Defense Council, Inc. v. EPA*, 822 F.2d
17 104, 123-24 (D.C.Cir.1987) (. . . “the most salient characteristic of this statutory scheme, articulated
18 time and again by its architects and embedded in the statutory language, is that it is technology-
19 forcing”). Boeing is simply not entitled to a permit with which immediate compliance is guaranteed.
20 An NPDES permit is an exception to the basic prohibition in the Clean Water Act against discharging
21 any pollutant. 33 U.S.C. 1311(a).
22

23 Indeed, by its very nature, the permitting system is intended to challenge dischargers. Numeric
24 limitations are imposed precisely for those parameters shown to require control efforts, but it is left up to
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Such showings have not and cannot be made.

1 the discharger to develop control strategies. Numeric limitations provide incentives; dischargers provide
2 solutions.

3 It is clear that Boeing requires incentives to address the enormous levels of pollution at this site. The
4 Regional Board's Executive Director recommended adoption of an individual NPDES permit for the site
5 with numeric limitations for toxics because past violations and site conditions indicated that a general
6 permit and BMPs were not adequate to protect the receiving waters. May 6, 2004 Transcript, pp. 75-76.

7 The Regional Board agreed that this history of violations required something more than BMPs, finding:
8

9 "Previous attempts to utilize BMPs to control the transport of contaminants have proven
10 ineffective as is demonstrated by the effluent limitation exceedances noted from Outfalls 003
11 through 007 on page 11 of the Fact Sheet (in the Compliance History Section). . . . Hence, this
12 order includes effluent limits for the storm water discharges from the site for priority pollutants
with reasonable potential." July 2004 Fact Sheet, p. 11.

13 Between October 2004 and April 2005, Boeing reported numerous additional exceedances of the limits
14 in the 2004 permit, resulting in Notices of Violation for 49 exceedances. Jonathan Bishop, letters to
15 Steve Lafflam, March 14, 2005 and October 7, 2005. Thus, again in 2006, the Executive Director
16 stressed that Boeing requires "the maximum incentives possible." January 19, 2006 Transcript, p. 27.
17 And again the Regional Board agreed, adopting additional numeric limitations and refusing to adopt the
18 proposed time schedule order that would have relaxed these incentives.
19
20

21 It is equally clear that Boeing can respond to incentives when it wants to. Boeing has enormous
22 corporate resources and access to competent technical expertise. For example, after the Topanga fire in
23 which its BMPs were destroyed, Boeing managed to replace and improve them within two months.
24 January 19, 2006 Transcript, p. 111; Boeing, Best Management Practices Review, Dec. 13, 2005.
25 Boeing removed soil contaminated with perchlorate when it became apparent that it had to do so to
26 control contaminated storm water from outfall 008 in the Happy Valley area. Boeing, Best Management
27 Practices Review, Dec. 13, 2005, p. 34; January 2006 Fact Sheet, p. 35. After numerous violations of
28

1 the 2004 permit limits, Boeing added an activated carbon filtration system to several outfalls – a system,
2 incidentally, that belies the suggestion that Boeing cannot *treat* contaminated storm water. January 19,
3 2006 Transcript, p. 234. And when Boeing feared that it would not be able to complete a rocket testing
4 program without violating permit limits, it quickly developed a system to store and treat effluent from
5 rocket testing. Jonathan Bishop, letter to Steve Lafflam, Mar. 24, 2006; Glenn Jaffe, transmittal to
6 Cassandra Owens, February 16, 2006, forwarding letter from Paul Costa to Natasha Lohmus, Feb. 16,
7 2006.

8
9 Boeing's insistence that its compliance burden should only be to implement a program of
10 iterative BMPs is wrong. As discussed above, iterative BMPs are authorized where determination of
11 numeric limitations is infeasible and are used in storm water general permits; but here the determination
12 of limits was feasible and Boeing was properly subject to an individual permit containing those limits.
13 The "maximum extent practicable" standard for municipal storm water dischargers under 33 U.S.C.
14 1342(p)(3) is simply not applicable to Boeing.

15
16
17 **C. Boeing's *Permit* May Not Be Modified To Include A Compliance Schedule For Toxic**
18 **Pollutants, Because Toxics Compliance Schedules As Permit Conditions Were No Longer**
19 **Authorized After May 18, 2005**

20 Boeing seeks to modify its permit to adopt a compliance schedule for the toxics for which more
21 stringent limits were imposed. This relief is not authorized by law. The only basis on which any form
22 of compliance schedule could be granted is through a time schedule order issued in connection with a
23 cease and desist order.

24 When the EPA enacted the California Toxics Rule, it provided that there would be no further
25 authority to provide a compliance schedule for toxics in permits after May 18, 2005. 40 C.F.R. §
26 131.38(e)(8). EPA explained that the CTR would initially allow compliance schedules up to five years,
27 but only if the compliance schedule was requested and implemented prior to the May 18, 2005 sunset
28

1 date. CTR, 65 Fed. Reg., 31682, 31704. EPA made clear that that the sunset provision applied to
2 issuance *and modification* of permits:

3 “The discharger’s opportunity to obtain a compliance schedule occurs when the existing permit
4 for that discharge is issued, reissued, *or modified* to contain more stringent limits based on the
5 water quality criteria in today’s rule. Such compliance schedules, however, cannot be extended
6 to any indefinite point in the future because the compliance schedule provision in this rule will
sunset of May 18, 2005.” *Id.*, emphasis added.

7 Thus, Boeing’s 2004 permit provisions can no longer be modified to provide a compliance schedule for
8 toxics.⁹ And the newly imposed permit conditions in 2006 are not subject to a compliance schedule in
9 the terms of the permit either.

10 The record is clear that Boeing did not request a compliance schedule for the 2004 permit at the
11 time it was adopted. Indeed, staff offered to provide interim permit limits in the 2004 permit, but
12 Boeing declined the offer. Jonathan Bishop, letter to Steve Lafflam, Nov. 15, 2005, pp. 2-3, 6-7.
13 Boeing’s 2004 petition challenging the numeric limits did not seek a compliance schedule. Boeing,
14 Petition, Aug. 1, 2004. In fact, Boeing did not request a compliance schedule until July 15, 2005, *after*
15 the compliance schedule provisions in the CTR had sunsetted and a compliance schedule could no
16 longer be granted.¹⁰ Steve Lafflam, letter to Jonathan Bishop, July 15, 2005.

20 ⁹ EPA stated that it would prefer that California adopt its own sunset provision prior to May 18,
21 2005, but since it recognized that California might not be able to do this timely, it included its own
22 sunset provision. CTR, 65 Fed. Reg. at 31704. EPA stated that it would stay its sunset provision if
23 California acted. *Id.* However, EPA has *not* stayed the sunset provision at section 131.38(e)(8) and
24 California has not adopted its own sunset provision. Note that the compliance schedule provisions in
25 section 2.1 of the SIP do not include the sunset provision that EPA invited California to enact; the SIP
26 had *already been adopted* and EPA was aware of its provisions when EPA promulgated the CTR.
Indeed, EPA stated that its sunset provision complemented the CTR’s compliance schedule provisions:
“[t]he sunset provision for the authorizing compliance schedule provision has been added to ease the
transition from a Federal provision to the State’s provision that was adopted in March 2000 as part of
its’ [sic] new statewide implementation plan.”

27 ¹⁰ The basis for this request was of course *not* the 2005 Topanga fire, which had not yet occurred.
Boeing offered different excuses for its claim that compliance was not feasible in this July 15, 2005
request: new analytical procedures for determining compliance for metals and dioxin and more stringent
28 limits for several parameters. But these excuses amounted to nothing more than the observation that the
new limits were more stringent in effect. The only “evidence” Boeing offered that compliance was not
feasible was the fact of Boeing’s non-compliance itself.

Boeing cites the provisions in 40 C.F.R. section 122.62 as authority to modify a permit to provide a compliance schedule for events over which the permittee has no control. However, this general provision cannot trump the express and clearly more specific sunset provision applicable to compliance schedules for toxics in section 131.38(e)(8). Indeed, section 122.62(a)(4) itself provides that compliance schedules may not conflict with other Clean Water Act deadlines.

Even if relief on the basis of infeasibility of compliance were warranted, which it is not, the only basis on which Boeing could be afforded this relief is through enforcement discretion, not changes to permit conditions. Thus, the only relief that the Regional Board even considered was suspension of its enforcement of existing permit limits pursuant to the time schedule provisions of a Cease and Desist Order under Water Code section 13301.¹¹ As discussed below, even this relief is not warranted because Boeing has not shown that compliance is not feasible.

D. The Denial Of The Proposed Cease And Desist Order Containing A Compliance Schedule Was Proper Because Compliance Was And Is Feasible

The issue before the Regional Board in January 2006 was whether to adopt a Cease and Desist Order (“CDO”) in which it would exercise enforcement discretion prospectively by guaranteeing a short period of relief from compliance obligations. The Regional Board properly decided to deny the CDO and to insist that Boeing continue to have the maximum possible incentives to comply.

That decision was justified because compliance with permit limits is feasible and Boeing has not shown otherwise. As Dr. Bell indicates, technology was and is available to meet permit limits. Bell

¹¹ Boeing’s discussion of anti-backsliding provisions at 40 C.F.R. § 122.62(l)(2)(I) – in particular the provisions that except permittees from anti-backsliding provisions when there is new information or events not under the permittee’s control – is simply not relevant, even though these provisions were mentioned in the Tentative Cease and Desist Order. Blythe Ponek-Bacharowski, letter to Steve Lafflam, Dec. 19, 2005, attached draft CDO, ¶ 26. Anti-backsliding analysis is only relevant in the context of permit *renewal, modification or reissuance*; it is not relevant in the enforcement context of a Cease and Desist Order. *CBE vs. Unocal*, 83 F.3d 1111, 1119-1120. And again, even if anti-backsliding analysis were somehow relevant, the anti-backsliding exception provisions of section 122.62(l)(2)(I) cannot trump the specific prohibition against initiating a toxics compliance schedule after May 18, 2005. 40 C.F.R. § 131.38(e)(8)

1 Decl., ¶¶ 23-27. Although overwhelming evidence demonstrates that storm water contamination is due
2 to industrial operations (see section E1, below), for which Boeing is clearly responsible, available
3 technology will address contaminants regardless of their sources. Bell Decl., ¶ 59. Thus, even if off-site
4 sources did contribute any significant amount of contaminants – a claim that Boeing has not established
5 – the technology Boeing was required to implement to address its own pollution would address these
6 sources.
7

8 Furthermore, as discussed above, the Clean Water Act does not guarantee a discharger permission to
9 discharge pollutants. Thus the Regional Board was entirely justified in denying a time schedule for
10 compliance even if it believed that Boeing could not *immediately* comply. Where a discharger, through
11 years of site contamination and inattention to discharge controls, has put itself in a position in which it
12 cannot immediately comply, relief is not warranted. The Regional Board considered Boeing’s history of
13 site contamination, its history of discharge violations, and the feasibility of compliance in light of
14 Boeing’s ample time to plan for more stringent limits, and then properly concluded that it should not
15 relax Boeing’s incentives.
16
17

18 The Regional Board properly discounted Boeing’s repeated argument that its history of
19 noncompliance somehow demonstrates the infeasibility of compliance, an argument that Boeing
20 continues to make. Boeing MPA, p. 33. The bare fact noncompliance cannot logically demonstrate
21 infeasibility – the obvious alternative inference is that Boeing has not made sufficient effort.
22

23 Dr. Bell indicates that technology exists that would allow Boeing to meet the effluent limits in its
24 permit. Bell Decl., ¶¶ 23-27, 59. Dr. Bell identifies a number of effective measures, combining erosion
25 control practices such as vegetative measures, erosion control mats, sediment ponds and traps, with
26 treatment systems such as wet ponds, sand and media filters, and cartridge filters for removal of specific
27 pollutants. *Id.*, ¶¶ 23-24. Storage and subsequent treatment could be implemented, as is evident from
28

1 the fact that storm water is already being stored in on-site ponds. *Id.*, ¶ 25. Dr. Bell offers an example
2 of successful storm water management at Honeywell’s New Jersey site, which is also undergoing
3 remediation. That site is meeting limits for storm water discharges that are *lower* than Boeing’s permit
4 limits for nickel, zinc, and mercury and comparable for chromium. *Id.*, ¶ 26. Thus, Dr. Bell directly
5 rebuts Paulsen’s sweeping claim that the permit limits cannot be met. Paulsen Decl., ¶ 6.
6

7 Boeing has not denied its obligation to prevent its industrial contaminants from polluting storm
8 water discharges. As discussed below, there is overwhelming evidence that effluent violations are due
9 to industrial contamination. Boeing attempts to avoid this issue by claiming that other pollution sources
10 may be causing contamination. However, even if this were the case – and Boeing has not established
11 this – it would be irrelevant. Boeing is obliged to control its industrial waste, and, as Dr. Bell indicates,
12 the same technology available to address industrial contaminants will also address natural sources of
13 these contaminants. Bell Decl., ¶ 59. Dr. Bell indicates that the cause of the pollution is irrelevant to
14 design of storm water management systems.
15
16

17 Boeing argues that compliance is not now *immediately* feasible and will take time.¹² However,
18 Boeing has long known that it needed to make additional efforts to comply, and it knew well in advance
19 that limits would become more restrictive. Boeing began repeatedly violating the numeric limits in its
20 1998 permit in the fall of 1998. July 2004 Fact Sheet, pp. 12-14. Boeing knew it would face stricter
21 limits well in advance of the July 2004 WDRs; indeed it received a May 1, 2002 draft of that permit
22 more than two years before those limits became effective. Jonathan Bishop, letter to Steve Lafflam,
23 Nov. 15, 2005, pp. 6-7. That draft proposed interim limits before the new, stricter limits became
24 effective, but Boeing declined the compliance schedule and subsequent drafts simply showed the new
25
26
27

28 ¹² Boeing makes much of a statement by the Regional Board’s Executive Officer that it could not
immediately comply. Boeing MPA, p. 10. However, that statement counts for nothing more than the
observation that Boeing has clearly not done what it should have done.

1 limits. *Id.* Boeing has not explained why it took no responsive action in 1998 or 2002 when it became
2 apparent that something other than standard BMPs was required.

3 Dr. Bell indicates that compliance technology has been available to Boeing since the 1990's.
4 Bell Decl., ¶ 62. Despite its knowledge of the problem and the availability of technology, Boeing did
5 not act. Now Boeing claims it needs years of iterative BMP implementation to comply. Paulsen Decl.,
6 ¶ 22. However, Boeing did not even begin using carbon filtration until 2005. January 19, 2006
7 Transcript, p. 234. And Boeing has pointed to no evidence that it has attempted to comply with permit
8 limits through anything other than erosion control measures and filters at some outfalls. Boeing, Best
9 Management Practices Review, Dec. 13, 2005.
10
11

12 As both Dr. Bell and Paulsen agree, storage and treatment may be necessary. Bell Decl., ¶ 25;
13 Paulsen Decl., ¶ 24. Boeing now argues that retention and treatment facilities will take time to design
14 and permit. Paulsen Decl., ¶ 24. What Boeing does *not* explain is why it did not begin this process
15 years ago when it became aware that it was not complying with existing limits and that new limits would
16 be stricter.¹³ Even Boeing's updated SWPPP submitted in 2005 after its numerous violations of the July
17 2004 permit and after the Topanga fire still does not indicate any plans for storage and treatment. Storm
18 Water Pollution Prevention Plan for Santa Susana Field Laboratory, November 2004, Revised December
19 2005.
20
21

22 Boeing should have begun a serious compliance effort at least as early as 1998. Boeing has not
23 demonstrated that it could not have complied had it made the effort. Because Boeing has not
24 demonstrated infeasibility of compliance, it is not entitled to a time schedule order.
25

26 ¹³ Note also that Boeing provides no information about how long it *would* take to provide retention
27 facilities and treatment. Dr. Bell indicates that skid-mounted treatment modules can be rapidly
28 constructed and that storage ponds are already present on-site. Bell Decl., ¶¶ 25, 26. And Boeing's own
example demonstrates that CEQA compliance need be no impediment when Boeing is sufficiently
motivated: Boeing's storage and treatment system to facilitate rocket testing will be exempt from
CEQA. Paul Costa, letter to Natasha Lohmus, Feb. 16, 2006, attached Notification of Lake or

1 **E. Although The Source Of Contamination Is Practically And Legally Irrelevant, Boeing Has**
2 **Not In Fact Demonstrated That Permit Exceedances Are Due To Other Pollution Sources**

3 The source of the contaminants in Boeing's storm water discharges is irrelevant as a practical matter
4 because, as Dr. Bell indicates, the same available technology that manages industrially caused
5 contamination will also manage naturally occurring contamination. Bell Decl., ¶ 59. The source is also
6 irrelevant as a legal matter because, as discussed below, Boeing is responsible to manage its storm water
7 to prevent polluting discharges regardless of source – just like any other permittee. However, Boeing
8 attempts to divert attention from these practical and legal realities with the absurd claim that its
9 industrial pollution no longer causes permit violations and the untenable claim that all future permit
10 violations are due to other causes.
11

12 **1. Permit Violations Are Due To Boeing's Industrial Pollution**

13
14 Incredibly, Boeing claims that, after half a century of site contamination causing dozens of discharge
15 violations, "historic contamination at SSFL does not appear to be impacting surface water quality."
16 Boeing MPA, p. 14. The claim is belied by overwhelming evidence in the record, including

- 17 • data demonstrating extensive contamination of the site with toxics, including metals and dioxin,
18 from industrial operations developed by DTSC in its RCRA investigation,
19
20 • a history of industrial site contamination and surface water discharge violations that *predates* the
21 primary supposed natural causes – the 2003 and 2005 Piru, Simi, and Topanga fires, and
22 • the fact that ongoing discharge violations include clearly non-natural substances such as
23 perchlorate and strontium-90.

24 Boeing offers the claims of one consultant to support its arguments that other pollution sources are
25 responsible for permit violations. But this consultant does *not* claim that these other sources are the
26 only, or even the primary, cause of permit violations. In particular, she does *not* claim that Boeing's
27

28

Streambed Alteration, p. 3, transmitted by Glenn Jaffe to Cassandra Owens, February 16, 2006.

1 own industrial contamination does not cause or contribute to permit violations; in fact, she simply
2 ignores the issue.

3 So Boeing can only cite its attorney’s testimony for the claim that its own site contamination is
4 not causing violations, and that testimony is a bare, uncorroborated assertion. Boeing MPA, p. 14, citing
5 testimony by Boeing’s counsel. And Boeing admits that *prior* exceedances of permit limits “may be
6 associated with former industrial activity.” *Id.* at 13. Boeing provides no explanation, much less any
7 evidence, as to why or when the violations due to former industrial activity suddenly ceased – because
8 there is none.
9

10
11 a. Direct Evidence Of Industrial Contamination

12 The Regional Board concluded that the site is heavily contaminated by past nuclear research and
13 rocket testing operations, and ongoing operations continue to generate contaminants. January 2006
14 WDRs, pp. 9-13. This conclusion was based on unrebutted testimony and documentary evidence of site
15 contamination.
16

17 Jim Pappas of DTSC testified that DTSC has undertaken a substantial investigation of site
18 contamination since 1996, including 6,000 soil samples. July 1, 2004 Transcript, pp.15-20. This
19 sampling data is in the record. DTSC, Preliminary RCRA Field Investigation (“RFI”) data, June 7,
20 2004. Gerald Abrams of DTSC explained that this site contamination was caused by rocket testing,
21 laboratories, component-test labs, fuel farms, loading facilities, and other testing areas and included
22 included solvents, PCBs, PAHs, metals, propellants, perchlorate, and hydrocarbon. July 1, 2004
23 Transcript, pp. 27-28. Daniel Hirsch, a member of the Interagency Work Group for the site cleanup,
24 explained to the Regional Board that the RFI data released to that group by DTSC shows extensive
25 contamination, including TPA, mercury, solvents, PAHs, metals, perchlorate, PCDs, and dioxins in very
26 high levels in the soil where they can be mobilized by rainwater and migrate off the property. *Id.*, pp.
27
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1 87-96. Mr. Hirsch also testified that the facility has included 12 nuclear reactors, a plutonium lab, and a
2 nuclear fuel fabrication facility; that a meltdown and two severe nuclear accidents occurred on the site;
3 that 30,000 rocket tests have taken place; that radioactive and toxic waste was burned in open pits; that
4 half a million gallons of TCE was disposed of on-site; that Boeing pled guilty to three environmental
5 felonies in connection with the disposal of hazardous wastes, which was discovered because an
6 explosion killed several workers; and that as a result, the site is extensively contaminated with
7 perchlorate, heavy metals, VOCs, and radioactive waste. January 19, 2006 Transcript, pp. 89-91. Dr.
8 Shelly Luce, Science and Policy Director of Heal the Bay, testified that effluent limits are warranted for
9 toxic chemicals known to be present in groundwater and soil at the site, evidence of which is provided
10 by both Boeing and DTSC. LARWQCB, Transcript of July 1, 2004 hearing, pp. 116-117. Regional
11 Board staff concluded that “it is unlikely that elevated concentrations of contaminants noted in the
12 discharges are from sources other than Boeing.” Jonathan Bishop, letter to Steve Lafflam, Nov. 15,
13 2005, p. 4. None of this testimony or evidence has been rebutted, or even challenged, by Boeing.

14 DTSC’s RFI data shows that there are substantial concentrations of dioxins and metals throughout
15 the site. These concentrations are well in excess of the background soil and ash concentrations that
16 Boeing claims are responsible for permit violations. Bell Decl., ¶¶ 28-30. And these concentrations
17 exist in areas from which storm water drainage has resulted in permit violations. *See* Storm Water
18 Pollution Prevention Plan for Santa Susana Field Laboratory, November 2004, Revised December 2005,
19 Figures 2-7 (Figure 2 showing drainage divides, other figures showing detailed facilities; demonstrating
20 that outfalls discharge flows that drain Solid Waste Management Units or ponds); RFI data (identifying
21 SWMUs and AOCs). This evidence clearly establishes that industrial contamination of soil, mobilized
22 by storm water, has caused permit violations.
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DTSC's RFI data show that concentrations of dioxins and metals in numerous sample sites exceed the background concentrations by one or more orders of magnitude. Bell Decl., ¶ 29. For example, dioxin congeners exceed the highest measured background level by as much as a factor of 293, and exceed that background level at 21 of the 57 sites sampled.¹⁴ *Id.* Metals comparisons are similar. *Id.*, ¶ 30. For example mercury concentrations at two sites exceed the highest reported background by a factor of 200, and exceed background for at least 17 of the 57 sites sampled.¹⁵ Bell Decl., ¶ 30. Copper exceeds background by a factor of 120.¹⁶ Lead comparisons show that concentrations exceed background by factors of 97 and 75, and exceed background at 14 of 57 sites.¹⁷ Chromium exceeds the highest background by a factor of 25; iron by a factor of 10.¹⁸

¹⁴ A single dioxin congener, OCDD, is reported at 381.85 ng/kg at the Laser Engineering Test Facility/Component Test Laboratory (Northeast Area RFI data), versus the highest background concentration reported in Table 10 of the Flow Science report of 1.3 ng/kg TCDD TEQ. Concentrations of individual dioxin congeners at the SWMUs and AOCs, expressed as 2,3,7,8-TCDD TEF, exceed the highest background TCDD TEQ of 1.3 ng/kg at 20 of the 57 sites sampled in the RFI data, including the Component Test lab-III, the Bowl Area, the Perimeter Pond, the Canyon Area, the Laser Engineering Test Facility/Component Test Laboratory, Building 359, APTF, New Conservation Yard, Building 100 Trench, Alfa Area, Silvernale Reservoir, Compound A Facility, Coca Area, R2 Ponds, CDFF, Old Conservation Yard, Former Sodium Disposal Facility, Happy Valley North, Building 206 ELV, and Area II Incinerator.

Since the RFI dioxin samples were not converted to TCDD TEQ to account for the presence of multiple dioxin congeners in a sample, comparisons likely understate the instances in which dioxin at the sample sites actually exceeds background TCDD TEQ.

Comparisons are based on data from Department of Toxic Substances Control, Preliminary RCRA Field Investigation, data summaries, June 7, 2004 and the highest soil background level reported in Flow Science Inc., Potential Background Constituent Levels in Storm Water at Boeing's Santa Susana Field Laboratory, February 23, 2006, Table 10.

¹⁵ Mercury is reported at 31.7 and 35.5 mg/kg at the Laser Engineering Test Facility/Component Test Laboratory (Northeast Area RFI data) and the Sodium Reactor Experiment (Western RFI data), versus a maximum background concentration of 0.17 mg/kg in Table 10 of the Flow Science report. Mercury concentrations reported in the RFI data summaries exceed the highest background level for at least 17 of the 57 sites sampled, including LETF/CTL-I, Area I Landfill, Building 359 Area, CTL-III, Bowl Area, Perimeter Pond, CTL-V, Happy Valley South, New Conservation Yard, Building 373 Leach Field, Former Sodium Disposal Facility, Building 56 Landfill, Building 9 Leach Field, Happy Valley North, ELF Fin. Ass., Area II Landfill, and IEL.

¹⁶ The LOX area has a concentration of 3500 mg/kg, compared to the maximum background concentration of 29 mg/kg.

¹⁷ Area I Landfill and Building 100 Trench have concentrations of 3300 and 2550 mg/kg respectively, compared to the maximum background concentration of 34 mg/kg. Lead concentrations reported in the RFI data summaries exceed the highest background level for at least 14 of the 57 sites

1 These metals and dioxin are the primary pollutants about which Boeing has expressed concern.
2 The RFI data, together with site history, demonstrate that Boeing's own industrially caused sources of
3 these pollutants are responsible for exceedances of permit limits at the site.
4

5 b. Evidence That Exceedances Pre-Date the 2003 and 2005 Fires

6 Boeing has claimed that exceedances are due to wildfires, including the 2003 Piru and Simi fires
7 and the 2005 Topanga fire. Boeing MPA, p. 14-16; Flow Science Report, 16-20. However, the fact that
8 permit violations and exceedances were occurring prior to these fires indicates that wildfires do not
9 cause or significantly contribute to permit violations.
10

11 All of the violations of the 1998 permit occurred before the October 2003 Piru and Simi fires.
12 July 2004 Fact Sheet, pp. 12-14. These included violations for antimony, cadmium, copper, mercury,
13 thallium, nitrate and nitrite as nitrogen, and TSS. *Id.* In addition, the reasonable potential analysis for
14 outfalls 001-002 for the 2004 permit was based on effluent monitoring data taken from August 1998 to
15 May 2003, *before* the October 2003 Simi/Piru fire, and nonetheless showed that there was a reasonable
16 potential that discharges would cause excursions above water quality standards. July 2004 Fact Sheet,
17 Attachment 1. The reasonable potential analysis for outfalls 003-007 was also largely based on pre-fire
18 data. July 2004 Fact Sheet, Attachment 2. These analyses showed that dioxin exceeded the
19 subsequently imposed permit limit of 2.8E-08 ug/L on ten occasions in 2001-2003, *before* the Piru and
20 Simi fires. July 2004 Fact Sheet, Attachment 1, p. 2 and Attachment 2, p. 2. Because the Flow Science
21 report is silent on the claim that ash from the Piru and Simi fires is responsible for violations, Boeing
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26 sampled, including Area I Landfill, LETF/CTL-I, Building 359 Area, CTL-III, Bowl Area, R-1 Pond,
27 Happy Valley South, Building 100 Trench, Coal Gas PDU, New Conservation Yard, Happy Valley
28 South, Area II Incinerator, ELV Fin. Ass., and LOX.

¹⁸ The LETF/CTL-I area concentration of chromium exceeds background by 25-fold. The
Compound A Facility concentration of iron exceeds background 10-fold.

1 offers no actual evidence that these fires played any significant role in causing or contributing to effluent
2 violations.

3 In addition, permit violations and exceedances of subsequently imposed permit limits were
4 regularly occurring before the 2005 Topanga fire. Effluent data before the 2005 fire showed 35
5 violations of 2004 permit limits at outfalls 001-007. January 2006 Fact Sheet, pp. 16-17. Effluent data
6 before the 2005 fire showed the reasonable potential to cause excursions above water quality standards
7 at the outfalls for which stricter limits were imposed in 2006. January 2006 Fact Sheet, pp. 36-37.
8 Monitoring data submitted by Boeing for the period August 2004 through April 2005 showed dozens of
9 discharges at previously unregulated outfalls discharging storm water that would have been
10 exceedances of the 2004 or 2006 limits had those limits been in effect at those outfalls. CBG *et. al.*,
11 letter to Susan Cloke, RWQCB, October 5, 2005.
12

13 Furthermore, as discussed below, the evidence that Boeing cites for the proposition that wildfires
14 are a significant source of contaminants in storm water effluent is flawed and does not support Boeing's
15 claim.
16

17
18 c. Evidence Of Exceedances Involving Contaminants Clearly Due To Boeing's
19 Industrial Operations

20 Boeing's claim that other sources of pollution are responsible for permit violations relates only to
21 a handful of metals and dioxin. However, discharges from Boeing's site include other contaminants that
22 are clearly not due to other pollution sources. Exceedances have included such substances a strontium
23 90 and perchlorate. Steve Lafflam, letter to LARWQCB, Information Technology Unit, Aug. 12, 2005,
24 2nd Quarter 2005 NPDES Discharge Monitoring Report Submittal, page 5 (strontium exceedance at
25 outfall 003); CBG *et. al.*, letter to Susan Cloke, RWQCB, October 5, 2005 (perchlorate exceedances at
26 outfalls 017 and 015). The Regional Board concluded that perchlorate is not a naturally occurring
27 substance and that its presence in receiving waters is due to operations at the SSFL facility. January
28

1 2006 WDRs, p. 27, ¶ 71. And after decades of nuclear operations at the site, it is clear that radioactive
2 Strontium-90 is not a natural substance. Violations include other clearly non-natural constituents,
3 including oil and grease and MBAS (detergents). Jonathan Bishop, letters to Steve Lafflam, Mar. 14,
4 2005 and Oct. 7, 2005.
5

6 Although Boeing makes no claim and offers no evidence that the presence of these substances in
7 its discharges is due to other sources, Boeing nonetheless objects to numeric limits for these constituents
8 too: it asks the State Board to vacate *all* new numeric effluent limits applicable outfalls discharging any
9 storm water. Boeing MPA, pp. 6-7, 46. Since outfalls 009-010, 011, and 018 had no effluent limits
10 until 2006, and outfall 008 had no limits until 2004, granting Boeing's appeal would permit it to
11 discharge clearly non-natural pollutants, including toxic strontium-90 and perchlorate, from these
12 outfalls with no numeric limits at all. Limits for new parameters, or new, more stringent limits for
13 existing parameters were added to the permit for outfalls 001-007 in 2004. Granting Boeing's appeal
14 would remove all of these limits, even though many of them are for constituents for which Boeing has
15 offered no evidence of an alternative source.
16
17

18 Even if the State Board properly rejects any relief with regard to constituents Boeing has not
19 claimed are due to an alternative source, it is important to note that their presence in effluent discharges
20 is still relevant to the propriety of limits for the metals and dioxin for which Boeing does make this
21 claim. If some substances present at industrially contaminated areas have been mobilized, then it is
22 apparent that the metals and dioxins also present in these areas can be mobilized too. Thus, the
23 exceedances of constituents for which Boeing does not dispute its responsibility provide additional
24 evidence that the metals and dioxin exceedances are also due to the industrial contamination.
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2. Boeing's Consultant Has Not Established That Violations Are Caused By Other Pollution Sources

Boeing relies on a report prepared by Paulsen on behalf of Flow Science Inc. to claim that “most of the recent permit exceedances are due to naturally occurring conditions that are beyond Boeing’s control.” Boeing MPA, p. 14. As noted above, the claim that such sources are beyond Boeing’s control is unsupportable because the source of the pollutant is irrelevant to control measures. Bell Decl., ¶ 59. Furthermore, as Dr. Bell indicates, the Flow Science report does not in fact establish that the effluent violations are due to naturally occurring sources of metals and dioxin. *Id.*, ¶¶ 31-58.

Airborne Deposition: The Flow Science claim that dioxin and metals contamination is due to airborne deposition is unsupportable for the following reasons:

- Flow Science cites a theoretical model that uses NOX emissions as a dioxin proxy, despite the fact that it predicts dioxin levels up to 10,000 times higher than actual data from the California Air Resources Board (“CARB”). Flow Science does not reconcile these wildly different results. Bell Decl., ¶¶ 31-33.
- Flow Science uses higher dioxin data from highly urbanized Los Angeles rather than from Ventura County, where the facility is located. *Id.*, ¶ 34.
- Flow Science fails to take into account the fact that the site elevation is above most of the dioxin emissions. *Id.*, ¶ 35.
- Flow Science inflates the metals estimates by averaging in metals deposits from highly urbanized areas, rather than using available data for an open space area. *Id.*, ¶ 36.
- Flow Science assumes with no substantiation that up to 50% of metals deposited would run off with rainfall, even though the SSFL site is entirely dissimilar to the imperviously surfaced urban sites for which there were data. *Id.*, ¶¶ 37-38.
- Flow Science compares effluent data for three metals from the SSFL site to effluent data from three other sites it claimed have significance portions of natural areas. However, none of the comparison data constitutes an appropriate control because none of it is collected downstream of undisturbed sites. *Id.*, ¶ 57.

- Similarly, the comparisons of SSFL effluent data to storm water data from other polluting land uses and industries is irrelevant, because there is no evidence that the pollution does not come from those land uses and industries. *Id.*, ¶ 58.

Dr. Bell concludes that Flow Science’s assertion that a substantial portion of the metals in SSFL runoff may derive from atmospheric deposition is simply not supported.¹⁹ *Id.*, ¶ 39.

Wildfire Effects: The Flow Science report does not support the conclusion that permit violations are due to wildfire effects. As discussed above, numerous permit violations occurred before the 2003 Simi and Piru fires and again before the 2005 Topanga fire. Note that the Flow Science Report does not even address the 2003 Piru and Simi fires.

Furthermore, Dr. Bell’s review of the Flow Science report demonstrates that its assertion that wildfires have or will cause permit violations is unsupported:

- Data presented by Flow Science in Table 10 actually shows that post-fire soil concentrations *decreased* for 16 of 19 constituents evaluated. Bell Decl., ¶ 44.
- Transient increases in dioxin and metals deposition rates during a few *days* in a year could only increase annual deposition amounts by a few percent, which will not make a significant contribution to permit violations. *Id.*, ¶¶ 41-42.
- Post-fire soil concentration data from the Los Alamos facility cited by Flow Science provides no support: like SSFL, the Los Alamos site was also a highly contaminated nuclear facility, and there were no pre-fire data against which to evaluate post-fire concentrations. *Id.*, ¶ 43.
- Appropriate storm water control technology is either impervious to wildfires (ponds and hardscaping to control erosion) or can be quickly replaced (treatment modules). *Id.*, ¶ 27.

¹⁹ Note that, despite its unsupported assumptions, Flow Science does not even predict that atmospheric deposition actually causes exceedances of *daily* permit levels for metals – the violations that have actually occurred. Flow Science Report, Table 8. The theoretical violations would be of monthly, not daily, permit limits – limits which Boeing has not in fact violated. Thus, Flow Science predicts a result that has not happened and is not at issue.

And Flow Science can only find that atmospheric deposition of dioxin would cause monthly permit limit exceedances, again not the violations at issue, by assuming an even higher transmissivity rate, 60%, than the highest rate it simply *assumed* for metals, 50%. Flow Science Report, pp. 14-15. The “analysis” simply assumes the desired result.

- Flow Science based its assumptions about post-fire erosion on samples taken immediately after the fire before any vegetative regrowth. *Id.*, ¶ 52. The samples may in fact have been taken before effective post-fire erosion control was taken. *Id.*
- Flow Science based its assumption about erosion of the entire south slope of the facility on one sample taken from outfall 008, which drains a uniquely high erosion area unlike the other south slope outfalls. *Id.*, ¶ 53. This single unrepresentative sample is not a credible basis for predictions. *Id.*

Dr. Bell concludes that Boeing's predictions of post-fire effluent concentrations are not credible. *Id.*, ¶ 40.

Furthermore, Boeing's predictions of post-fire effluent concentrations at SSFL assume that post-fire erosion will be many times higher than pre-fire erosion, that this erosion will not be controlled, and that effluent will not be filtered or treated. *Id.*, ¶ 51. These are not reasonable assumptions because Boeing can and should control erosion and treat effluent. *Id.*

Erosion Of Native Soils: Flow Science claims that erosion of native soils contributes significant pollutant loads. Flow Science Report, Tables 14a, 14b, and 15. This claim is unreasonably based on a model that assumes that erosion is not controlled, that storm water is not treated, and that the source of pollutants is native soils, not industrial contamination. Bell Decl., ¶¶ 46, 51. These assumptions are all faulty: erosion can be controlled, effluent can be treated, and the overwhelmingly significant contamination source is industrial pollution, measured at levels orders of magnitude higher than native soil background levels.

Even on its own assumptions, Boeing's model does not credibly explain permit violations. *Id.*, ¶ 56. The model is biased because it predicts violations that do not occur, and it is incomplete because it does not predict violations that do occur. *Id.*, ¶¶ 48, 50. The model does not explain why effluent concentrations have so substantially exceeded permit limits. *Id.*, ¶ 49. Exceedances of permit limits by two orders of magnitude indicate that the pollutions source is not natural but industrial.

1 In sum, the Flow Science Report is a distraction: it does not establish that Boeing's violations are
2 caused by other pollution sources or that the Topanga fire has rendered compliance infeasible. The
3 report is the centerpiece of Boeing's claim that compliance with permit limits is infeasible, yet it does
4 not evaluate or even discuss control strategies. It simply assumes that existing levels of erosion will
5 continue, and that Boeing will not implement effective treatment. And it studiously ignores the elephant
6 in the room: the industrial contamination laid down over decades of nuclear operations, rocket testing,
7 and hazardous waste disposal.

8 9 **3. In Any Event, Boeing Is Responsible For Discharging Pollutants Regardless Of** 10 **Source**

11 Boeing never actually connects the dots between its claim that some constituents are not the
12 result of its own industrial operations and its claim that permit limits are improper. In particular, Boeing
13 cites no authority for its notion that a permittee is not responsible for contamination in point source
14 discharges just because it did not cause the contamination. This is not surprising, because the authority
15 is the contrary.

17 A permittee *is* "discharging a pollutant" within the meaning of 40 C.F.R. 122.2, and it *is*
18 responsible to control that discharge, when it channels contaminated surface runoff, even if the permittee
19 did not cause the contamination. *Committee to Save Mokelumne River v. East Bay Municipal Utility*
20 *District*, 13 F.3d 305, 308 (9th Cir. 1993); *see also Sierra Club v. El Paso Gold Mines, Inc.* 421 F.3d
21 1133 (10th Cir. 2005).

23 Boeing implies that it should not be responsible for pollutants that are the result of atmospheric
24 deposition. However, in the Storm Water Multi-Sector General Permit for Industrial Activities, EPA
25 specifically states that a discharger *is* responsible for run-off that is affected by atmospheric/dry
26 deposition. 65 Fed. Reg. 64746, 64769, Oct. 30, 2000.
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1 Furthermore, Boeing collects storm water and reuses it for operations. January 2006 WDRs, pp.
2 4-6. Where a discharger collects storm water for use in industrial processes and then discharges it, the
3 source of the pollution and the ability of the discharger to affect that source are immaterial. *In re: J & L*
4 *Specialty Products Corp.*, 1994 WL 276873, 5 E.A.D. 333, E.P.A., Jun 20, 1994.
5

6 Finally, as Regional Board staff have indicated, flows from onsite ponds and Solid Waste
7 Management Units may properly be characterized as wastewater discharge, not storm water-only
8 discharges. Jonathan Bishop, letter to Steve Lafflam, Nov. 15, 2005, p. 10. Essentially all of the
9 outfalls discharge flows that drain Solid Waste Management Units or ponds. See Storm Water Pollution
10 Prevention Plan for Santa Susana Field Laboratory, November 2004, Revised December 2005, Figures
11 2-7 (Figure 2 showing drainage divides, other figures showing detailed facilities including SWMUs and
12 AOCs); RFI data (identifying SWMUs and AOCs).
13

14 Even a small developer disturbing a few acres of land is responsible to control the erosion of
15 native soils. There is no reason that Boeing should not be required to assume the same responsibility.
16

17 **F. Boeing's Challenge To Numeric Limitations In The 2004 Order Must Be Rejected As**
18 **Untimely Sought**

19 Boeing has altered both the nature of, and the grounds for, the relief it sought in its first petition
20 in August 2004. Thus, relief with respect to the 2004 order should be rejected as untimely requested.

21 The 2004 petition did not seek to vacate *all* new numeric effluent limits added to the 2004 permit
22 applicable to *all* storm water discharges or to obtain a compliance schedule, which is the relief now
23 requested in Boeing's MPA. Nor did Boeing object to numeric limits for the same reasons that it now
24 advances. A comparison of Boeing's 2004 petition to the relief it now seeks reveals the following
25 differences:
26

- 27 1. Boeing's 2004 petition objected to the numeric limits on outfalls 003-007 on the grounds
28 that these outfalls discharged *only* storm water. Petition, Aug. 2, 2004, Section B, pp. 6-
7. Now Boeing also objects to numeric limits on outfalls discharging *combined* industrial

process water and storm water, *e.g.*, outfalls 001 and 002. Boeing MPA, pp. 6-7, 46. Petition, Feb. 21, 2006, p. 6.

2. Boeing's 2004 petition objected to certain numeric limits because, it claimed, the Regional Board had not properly followed the procedures for reasonable potential analysis in the State Implementation Policy for Toxics (SIP). Petition, Aug. 2, 2004, Section C, pp. 7-8.²⁰ Boeing has abandoned these arguments. Now Boeing objects to *all* newly imposed numeric limits, and bases that objection on its claim that the SIP's reasonable potential analysis procedures do not apply at all. Petition, Feb. 21, 2006, pp. 3, 6; Boeing MPA, 24-26.
3. Boeing's 2004 petition did not seek interim limits or a compliance schedule and Boeing did not argue that compliance was infeasible. Indeed, Boeing *declined* interim limits during the drafting of the 2004 permit. Jonathan Bishop, letter to Steve Lafflam, Nov. 15, 2005, pp. 2-3, 6-7. Now Boeing seeks to amend the permit to include a compliance schedule, claiming that immediate compliance is infeasible. Petition, Feb. 21, 2006, p. 6; Boeing MPA p. 46.

Because Boeing did not object to all newly imposed limits at outfalls 001-002 in its 2004 petition, it cannot now seek to vacate those limits based on its 2004 petition. In The Matter Of License 10133, Issued On Permit 7601 (Application 11311) And Extension Of Time Under Permit 10364 (Application 15998) Of Casitas Municipal Water District To Appropriate From The Ventura River, Order WR 73-44 September 25, 1973. Boeing's current objections to the newly imposed limits at outfalls 001-002 must be dismissed because this relief was not demanded timely. Furthermore, Boeing has abandoned the grounds on which it did challenge the limits at outfalls 001-001, so there is no basis on which relief can be granted.

Boeing objected to the imposition of numeric limits at outfalls 003-007 in its 2004 petition, basing this objection solely on the footnote in the SIP which Boeing claims makes the SIP inapplicable to storm water. However, Boeing did not object to the *determination* of those limits. If the State Board finds that the SIP's footnote 1 does not by itself bar numeric limits, then Boeing's new objections that

²⁰ In particular, Boeing's 2004 objections were a) that had the Regional Board properly applied the SIP's reasonable potential analysis procedures, it would not have imposed certain limits, b) that the Regional Board improperly retained certain limits from the prior permit despite anti-backsliding exceptions, and c) that the Regional Board improperly imposed MUN-based effluent limits. Petition,

1 those limits were not properly determined because SIP protocols were employed should be dismissed.

2 The grounds for this relief were not raised timely.

3 Boeing did not object to immediate compliance with numeric limits imposed in the July 2004
4 order, on the grounds of infeasibility or otherwise. Boeing's request that a compliance schedule should
5 be provided in its permit for limits imposed in 2004 should be dismissed as untimely raised, particularly
6 insofar as Boeing seeks retroactive relief.
7

8 Boeing claims that at the time it filed its 2004 petition it confirmed that it would be given the
9 opportunity to amend its petition and to submit detailed Points and Authorities. Petition, Feb. 21, 2006,
10 p. 2. Boeing provides no evidence for this assertion. More importantly, Boeing provides no authority
11 for the notion that a petitioner can be permitted to change the nature of, and basis for, the relief it seeks
12 eighteen months after filing a petition. The State Board's regulations required Boeing to submit a
13 petition *within 30 days* of the Regional Board's July 1, 2004 action, a petition that identified and
14 supported its concerns with *particularity*, including:
15

- 16 • "the specific action or inaction of the regional board" to be reviewed,
- 17 • a "full and complete statement of the reasons the action or failure to act was inappropriate or
18 improper," and
- 19 • a "statement of points and authorities in support of the legal issues raised in the petition,
20 including citations to the documents or the transcripts of the regional board hearing where
21 appropriate." 22 C.C.R. § 2050(a).

22 Boeing should not be allowed to sit on any rights it may have had with respect to its 2004 petition and
23 then to circumvent this Board's petition regulations by untimely seeking different relief or seeking it for
24 different reasons.
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Aug. 2, 2004, Section C, pp. 7-8. Boeing has not briefed any of these claims.

1 **G. Boeing's Challenges To Numeric Limitations Should Be Rejected As Unclear**

2 Boeing has broadly challenged “any new numeric effluent limits added to the 2004 or 2006 Permits
3 applicable to storm water,” seeking to stay and vacate the limits on several grounds. Boeing MPA, pp.
4 6-7, 46. These grounds included the claims 1) that numeric limits may not be applied at outfalls
5 discharging any storm water at all, 2) that the limits were improperly determined, and 3) that denial of a
6 compliance period was improper. Dozens of new numeric limits were added in the July 2004, January
7 2006, and March 2006 orders.

8 None of Boeing's arguments embraces all “new numeric effluent limits added to the 2004 or
9 2006 Permits applicable to storm water,” but Boeing has not explained which arguments apply to which
10 limits, and it is clear that not all of the arguments can apply. Relief should be rejected because Boeing
11 has not made clear what it seeks and why. Boeing has not met its obligation under 23 C.C.R. section
12 2050(a) to identify the relief it seeks and the reasons for relief.

13 For example, as noted above, Boeing's argument that numeric limits should not be applied at
14 outfalls discharging any storm water at all clearly does not apply to the outfalls that are permitted to
15 discharge both storm water and industrial waste water. Nothing in Boeing's arguments supports such a
16 broad claim. Thus there is no basis to vacate numeric limits at outfalls 001, 002, 011, or 018 on the
17 basis of that argument, because these outfalls are permitted to discharge industrial waste water.

18 Also as discussed above, Boeing's arguments that numeric limits were incorrectly determined
19 lacks any specificity with respect to outfalls or parameters. Boeing does not even provide an *example* of
20 how the Regional Board got it wrong in determining that limits were required and calculating that limit.
21 This lack of specificity points up the fact that Boeing's objections are purely theoretical. Boeing has
22 simply not carried its burden to show that the Regional Board's reasonable potential analysis and limit
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1 derivations were incorrect for each “new numeric effluent limits added to the 2004 or 2006 Permits
2 applicable to storm water.”

3 Boeing’s claims regarding infeasibility of compliance are similarly unsubstantiated with respect
4 to each contested parameter at each outfall. For example, Boeing makes much of its argument that
5 permit violations are due to pollutants it did not cause. Boeing’s arguments specifically address only a
6 handful of parameters, yet Boeing seeks a compliance schedule for *all* newly imposed limits, including
7 limits for parameters such as perchlorate and strontium-90 that are clearly due to Boeing’s industrial
8 activity and for which Boeing has offered no argument whatsoever.

9 Boeing’s lack of specificity in its appeals was pointed out at the stay hearing. The hearing
10 officer agreed that Boeing had not focused its challenges. In response to a request from the hearing
11 officer, Boeing subsequently provided a wish list of effluent limitation it sought to have stayed. That it
12 was necessary for Boeing to clarify what parameters it wanted stayed *after* other parties had had to
13 respond to its vague broad-brush claims demonstrates that the parties were denied an opportunity to
14 focus their evidence and presentations in opposing the stay. Once again, because there is no indication
15 that Boeing’s petition is now limited to the parameters subject to the stay, the parties are in exactly the
16 same position in arguing the merits. What effluent limitations does Boeing actually seek to vacate?
17 Which of its arguments apply to each of these limitations? Boeing’s appeals should be denied because
18 Boeing has simply failed to make clear the relief it seeks and the specific grounds for that relief.

1 **IV. CONCLUSION**

2 For the forgoing reasons, Boeing's request that the State Board vacate any numeric effluent
3 limitations in its NPDES permit should be denied. The limitations were properly imposed and Boeing
4 has not shown that it cannot comply with them.
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7 Dated: June 15, 2006

Respectfully submitted,

8 M. R. WOLFE & ASSOCIATES, P.C.

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13 _____
John H. Farrow

14 Attorneys for Committee to Bridge the Gap, Southern California
15 Federation of Scientists, and Physicians for Social Responsibility –
16 Los Angeles Chapter
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